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Chester House & Co v Nairobi City Council
[1966] 1 EA 1 (HCK)

Division: High Court of Kenya at Nairobi
Date of judgment: 1 February 1966
Case Number: 47, 48, 49 and 50/1961
Before: Madan J
Sourced by: LawAfrica

[1] Rates – Principles of assessment under s. 9(2) Rating Act (Cap. 266) (K.).

[2] Rates – Appeal from valuation court – Grounds of interference by appellate court – Civil Procedure Act, s. 78 and s. 79 (K.).

[3] Appeal – Jurisdiction – Valuation for rates – Question of fact in appeal from valuation court – Principles on which appellate court acts.

[4] Jurisdiction – Rating – Powers of High Court in appeal from valuation court – Civil Procedure Act, s. 78 and s. 79 (K.).

Editor's Summary

The appellant company, together with three other rate-payers, who subsequently consolidated their appeals, objected before the valuation court to the unimproved site value ascribed to its property in the draft valuation roll as at August 1, 1959. The valuation court, after hearing expert opinions on both sides, reduced the valuation from £72,600 to £64,600 on the appellant proving that it had at the time of valuation purchased the land with improvements for £52,000. The valuation court gave no reasons. The appellant further appealed (No. 47) on the grounds that the valuation court had misdirected itself in fact and law in applying the provisions of s. 9(2) of the Local Government (Valuation and Rating) Act, 1956. The other appellants adopted the same grounds of appeal as each other based on comparisons with current market values and with surrounding properties. On appeal,

Held –

- (i) in a rating appeal the High Court had jurisdiction to deal with both questions of fact and law under ss. 78 and 79 of the Civil Procedure Act;
- (ii) the hypothetical valuation ascribed by the valuation court pursuant to s. 9(2) of the Local Government (Valuation and Rating) Act, 1956 was a finding of fact which should be reviewed by an appellate court with caution as it had been arrived at on conflicting testimony; it envisaged the maximum potential price which could be obtained by the optimum hypothetical methods of realisation and thus the actual price paid may be the best evidence of the hypothetical value;
- (iii) the appellants had to show that the conclusion reached, on conflicting evidence (there being no

finding of fact) was not reasonably entertainable by a man who properly understood the law or that there had been an error of principle;

- (iv) appeals 48 and 49 failed but appeals 47 and 50 were allowed because the value ascribed was so incomprehensible in relation to the actual sale price of the property that some incorrect method or use of material must have been used to produce it.

Appeal allowed in part. Case remitted to the valuation court with a direction to fix a more realistic value in respect of the two plots.

Cases referred to in judgment:

- (1) *Watt (or Thomas) v. Thomas*, [1947] 1 All E.R. 582.
- (2) *R. v. Paddington Valuation Officer and Another, Ex parte Peachey Property Corporation Ltd.*, [1964] 1 W.L.R. 1186; [1965] 3 W.L.R. 426.
- (3) *Duke of Buccleuch v. I.R.C.*, [1956] 3 W.L.R. 977.
- (4) *Ellesmere (Earl) v. I.R.C.*, (1919) L.T. 568.
- (5) *Poplar Metropolitan Borough Assessment Committee v. Roberts*, [1922] A.C. 93.
- (6) *Robinson Bros. (Bewers) Ltd. v. Houghton and Chester-le-Street Assessment Committee*, [1937] 2 K.B. 445.
- (7) *Toohey's Ltd. v. Valuer General*, [1925] A.C. 439.
- (8) *Cardiff Rating Authority and Assessment Committee v. Guest Keen and Baldwin's Iron & Steel Co. Ltd.*, [1949] 1 K.B. 385.

Judgment

Madan J: These four Civil Appeals, nos. 47, 48, 49 and 50 of 1961 have been consolidated by consent of the parties. They all arise out of valuation of certain parcels of land in Nairobi for rating purposes under s. 9(2) of the Local Government (Valuation and Rating) Act, 1956, which is now Cap. 266, Laws of Kenya. For the sake of convenience Appeals nos. 47 and 50 which affect adjoining properties being plots 891/2/1 and 1326 have been consolidated in one group; and, also for the same reason, Appeals nos. 48 and 49 affecting plot 923 and plots 919-922 respectively into a second group.

The City Council of Nairobi, the local authority concerned under the Act, caused a draft valuation roll to be prepared for rating purposes of the value of unimproved land as on August 1, 1959. The appellants being aggrieved by the values ascribed in the draft valuation roll to their rateable properties lodged objections against the same under s. 11 of the Act. In due course their objections were determined by a valuation court appointed for the purpose under s. 13. The appellants feeling aggrieved also by the decision on the objections have appealed to this court against the decision of the valuation court under s. 20.

Although on an appeal from a decision of the valuation court the mantle of a super valuation court falls on this court, nowhere in the Act does it seem to be laid down what this court may do if it feels disposed to allow the appeal. In the absence of any statutory provision dealing with the matter and apart from the inherent jurisdiction to remedy a wrong, the court may I think exercise its appellate jurisdiction which is to be found in s. 78 of the Civil Procedure Act by virtue of the enabling provisions of s. 79(b) of

the same Act.

In Appeal no. 47 the ground of objection before the valuation court was that the property in question was purchased by the objector (appellant) in 1959 for Shs. 1,020,000/- and the value of the land (value of unimproved land) should be only Shs. 600,000/-. In the other three appeals the main ground of objection was that the values ascribed to the plots in the roll are exorbitant which bear no relation to current market value of the land. The valuation court reduced the values of all the plots involved except plot 919 which it confirmed. Plot 919 is one of the four plots the subject matter of Appeal no. 49.

Save for variations in the numbers and values of the plots concerned the grounds of appeal to this court are identical in all the four appeals. As a sample I quote the grounds of appeal in Appeal no. 47.

- “1. That the valuation court in so fixing the value of the said premises at the sum of Shs. 1,292,000/- and declining to fix it at a lower value misdirected itself in fact and that the finding of the said court was against the evidence and the weight of the evidence.
2. That the valuation court in so fixing the value of the said premises at the sum of Shs. 1,292,000/- misdirected itself in law by failing properly to apply to the facts proved or admitted the provisions of s. 9 of the said Ordinance. (Act).”

For the purpose of preparing a draft valuation roll for rating purposes in Nairobi the value of unimproved land has to be ascertained on the basis set out in s. 9(2) which reads as follows:

- “9(2). The value of unimproved land shall, for the purposes of a valuation roll or supplementary valuation roll, be the sum which the freehold in possession free from encumbrances therein might be expected to realise at the time of valuation if offered for sale on such reasonable terms and conditions as a bona fide seller might be expected to impose, and if the improvements, if any, thereon, therein or thereunder had not been made, due regard being had, not only to such particular land, but also to other land of similar class, character or position, and to other comparative factors, and to any restrictions imposed on the land, and on the use of the land, by the local authority or a town planning authority by or under any by-laws or town planning powers, being restrictions which either increase or decrease the value of the land.”

Under the principles enunciated by the House of Lords in *Watt (or Thomas) v. Thomas* (1) (see the speeches of Viscount Simon, Lord Thankerton and Lord Macmillan, [1947] 1 All E.R. at pp. 583, 584, 587 and 590) while an appellate court has jurisdiction to review the record of evidence, in this case the record of proceedings before the valuation court, in order to determine whether the conclusion originally reached on the evidence should stand this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide but not so if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at and especially if that conclusion has been arrived at on conflicting testimony. In order that it may interfere the appellate court must be satisfied that the judgment of fact is unsound and unmistakably so appears from the evidence or if it is demonstrated that the judgment on the facts is affected by material inconsistencies and inaccuracies, or if there has been failure to appreciate the weight or hearing of circumstances admitted or proved or otherwise to have gone plainly wrong.

Further, the appellants must also show, in the words of the Divisional Court in *R. v. Paddington Valuation Officer and Another, Ex parte Peachey Property Corporation Ltd.* (2) that “the valuation officer has so misdirected himself on some fundamental matter or matters which so vitiate the value of his work that it must be regarded as worthless”. In short, there must be an error which goes to the root of the list (roll) (see per Lord Denning, M.R., [1965] 3 W.L.R. at p. 437).

To take Appeals nos. 48 and 49 first. The main burden of the appellants’ argument before the valuation court, as it is in this court also, was that the valuation officer erred in placing too high a value on the plots.

The hypothetical value of unimproved land which I think it must be on the basis of valuation provided for in s. 9(2) is a question of fact just as it is a question of fact for estate duty purposes under similar statutory provisions in England. It is not really a matter of law at all (per Danckwerts, L.J., in *Duke of Buccleuch v. I.R.C.* (3) ([1965] 3 W.L.R. at pp. 991-992)).

Under the English system relating to ascertainment of the annual value for rating purposes a person who appears before a local valuation court on the hearing of an appeal and is aggrieved by its decision may appeal to the Lands Tribunal. A person aggrieved by the decision of the Lands Tribunal as being erroneous in a point of law may require the tribunal to state a case for the decision of the Court of Appeal. But the Court of Appeal cannot disturb a conclusion of fact drawn by the Lands Tribunal unless either (1) the tribunal has misunderstood or misinterpreted the law, or (2) the conclusion is one, which, on the evidence or on the primary facts found by the tribunal, a man who properly understood the law could not reasonably entertain (32 Halsbury's Laws (3rd Edn.) pp. 127, 130 and 131).

The position of this court would seem to be a cross between the Lands Tribunal and the Court of Appeal but without being inhibited from dealing with questions of fact. Once again however the indication is clear that an appellate court will not lightly interfere with a judgment of fact.

The onus therefore is heavy indeed upon the appellants. If I may respectfully adapt the language used by Danckwerts, L.J., in *Ex parte Peachy Property Corporation Ltd.* (2) ([1965] 3 W.L.R. at p. 445), in order to succeed the appellants have to show that the valuation officer has gone wrong in law because he has taken into consideration matters which were not proper to be regarded, or has omitted to consider matters which were of direct importance in ascertaining the values to be put upon the plots. It is not sufficient to show that by mischance or ineptitude the valuation officer has reached values which are incorrect in regard to particular plots. In my view in the two appeals under consideration the appellants have singularly failed to discharge their onus. Apart from contending and emphasising that the values ascribed to the plots in question are excessive, they have failed to show that there has been an error in principle.

The appellants were represented before the valuation court by a valuer of their own choice. The valuation court arrived at its decision on a question of fact ascertained on conflicting expert evidence. The tangible value of evidence adduced on behalf of the appellants came practically to naught for in the main it was opinion evidence. The appellants have also failed to show that the methods adopted by the valuation officer were not consonant with his duty to find the hypothetical value of unimproved land reasonably to be expected and not within his discretion as an expert (adapted, per Lord Denning, M.R., in *Ex parte Peachey Property Corporation Ltd.* (2) ([1965] 3 W.L.R. Headnote).

In addition, speaking comparatively, these two appeals really lie in a world of trivialities. The valuation court confirmed the value of plot 919 at a rate per square foot which the appellants' valuer indicated he was prepared to accept (Ex. A.P. 10). The valuation court reduced the value of the other four plots. In regard to plot 920 I calculate the difference to be about £1,800 (in round figures) between the value suggested by the appellants' valuer and the value finally ascribed to it by the valuation court amounting to about £32,000. So also with the remaining three plots, the suggested difference increasing progressively but not strikingly. In many cases, however, reasonable men properly understanding the law may reach different conclusions, and in such cases an appellate court does not interfere (32 Halsbury's Laws (3rd Edn.), p. 131). In the words of Lord Macmillan (*supra*), the appellants have failed to show that the valuation

court failed to appreciate the weight or bearing of circumstances admitted or proved or that it has gone plainly wrong.

Appeals nos. 48 and 49 therefore fail and are dismissed.

The remaining two appeals are no. 47 and no. 50. The building on plot 891/2/1 is known as Chester House. It, together with the improvements thereon, was agreed to be sold in the open market by its owner the Duke of Westminster within about a week of the date of the draft valuation roll in August, 1959 for £52,000 (Exs. 1 and 3). The buildings on this plot are described as including a three-storied building with showrooms and a tremendous workshop with steel joists and a corrugated iron roof running away at the back of it (Ex. B, p. 1). Its roll value of £72,600 was reduced by the valuation court to £64,000 and the value of plot 1326 was reduced from £48,800 to £38,700. No doubt the valuation court felt I think that being intimately connected as adjoining plots the valuation of one must affect the other.

In order to ascertain the value of unimproved land under s. 9(2) a bona fide seller has to be envisaged. Again, if I may respectfully adapt the language of Denning, M.R., in *Duke of Buccleuch v. I.R.C.* (3) ([1956] 3 W.L.R. at p. 990), a hypothetical sale in the open market, not in a restricted market, must be envisaged; also envisage a hypothetical sale in which all preliminary arrangements have been made so that the property can be sold “in such a manner and subject to such conditions as might reasonably be calculated to attain for the vendor the best price for the property”, per Sankey, J., in *Ellesmere (Earl) v. I.R.C.* (4) ((1919) L.T. at p. 573).

On the face of it therefore it would appear, as learned counsel for the respondent has also submitted, that the actual price paid is no criterion. But this is not entirely so. The actual price paid is not to be ignored completely for in some cases it may be the best evidence of the hypothetical value to be ascribed.

In England where the same sort of problem arises in ascertaining the hypothetical rateable value, there, in the words of Lord Buckmaster in *Poplar Metropolitan Borough Assessment Committee v. Roberts* (5) ([1922] A.C. at p. 103):

“The tenant referred to is, by common consent, an imaginary person; the actual rent paid is no criterion, unless, indeed, it happens to be the rent that the imaginary tenant might reasonably be expected to pay in the circumstances mentioned in the section. But although the tenant is imaginary, the conditions in which his rent is to be determined cannot be imaginary.”

And in *Robinson Bros. (Brewers) Ltd. v. Houghton and Chester-le-Street Assessment Committee* (6) ([1937] 2 K.B. at pp. 468-469) Scott, L.J., said:

“Where the particular hereditament is let at what is plainly a rack rent or where similar hereditaments in similar economic sites are so let, so that they are truly comparable, that evidence is the best evidence, and for that reason is alone admissible.

The land must be taken as it exists at the date of the valuation”

per Lord Dunedin in *Toohey's Ltd. v. Voluer General* (7) ([1925] A.C. at p. 443). And in *Ex parte Peachey Property Corporation Ltd.* (2), Danckwerts, L.J., said ([1965] 3 W.L.R. at p. 447):

“It is true, of course, that the rent to be assessed under the statute is a hypothetical rent and not the actual rent that may be paid . . . It is, in my view, no less than common sense that in some, if not many, cases the rent actually paid may have evidentiary value . . . In some cases, no doubt, the rents actually paid by tenants may be no criterion in regard to the hypothetical rent. In other cases they may be most valuable evidence. It is

wrong to disregard them, particularly when other evidence is difficult to obtain.”

In my view therefore the evidence relating to the sale of Chester House in the open market at or about the time of the valuation is both relevant and properly admissible.

The municipal valuer conceded before the valuation court that plot 1326 was probably overvalued. About Chester House he said that if the site were vacant it would be possible to develop it more profitably and also that the use to which the plot had been put was reflected in the price paid for it. If properly developed the plot would be of more value (Ex. B., pp. 3 and 4).

The municipal valuer no doubt I think had the statutory requirement in mind that when assessing value of unimproved land the improvements thereon must be disregarded as if they are non-existent. It is a statutory requirement and it must be so. But I think there is an element of error here which results from overstepping, perhaps it would be more correct to say, from over-emphasising the statutory requirement. When sold in the open market in compliance with and subject to conditions imposed by statute, the buyer would no doubt take into account the potential use of the land in relation and subject to use of other land of similar class, character or position. The potential use of land in an area takes place according to the atmosphere of the locality. To some extent therefore, however small, even insignificant, it may be, the existing pattern of development must influence the potential development value of sites. In the wise words of Lord Dunedin already quoted the land must be taken as it exists at the date of the valuation.

In my view the municipal valuer fell into the error, an error which the valuation court also neither adequately appreciated nor reduced (it) to its proper or correct perspective, of thinking, once again if I may respectfully adapt the language of Winn, L.J., in *Duke of Buccleuch v. I.R.C.* (3) ([1956] 3 W.L.R. at p. 993) that s. 9(2) requires or permits a valuation of property on any hypothetical basis of a maximum potential price which could be obtained for it by the optimum hypothetical methods of realising it. The sum or value which is required to be applied when making the hypothetical valuation must be the price obtaining in a market for the property which is properly called the open market, that price being the price which prevailed in that market at the time of making the valuation. I do not think s. 9(2) contemplates any other type of higher valuation.

The municipal valuer does not seem to have taken into account the price realised on the sale of Chester House and although it was brought to the notice of the valuation court, it too would seem to have ignored it judging by the result of its decision. This I think was wrong particularly as the record of proceedings shows and this is also conceded by respondent’s learned counsel that evidence of other sales in the area was difficult to obtain. This I think was wrong because as Scott, L.J., said in that case:

“Wherever the direct evidence test is not available, no fact which would in all the actual circumstances of the case tend to raise or lower the amount of rent likely to be given by probable competitors can be either irrelevant or inadmissible.”

No price which is likely to be paid for the unimproved land by probable and bona fide buyers in the open market can be either irrelevant or inadmissible. The record of proceedings before the valuation court shows that Chester House was on books for sale for several years without a bargain being made. When it was agreed to be sold the transaction took place subject to a favourable mortgage.

The offer to buy and sell Chester House at a stated price in the open market at about the time of the valuation (Exs. 1 and 3) provided some evidence of the value

of unimproved land in question. The evidence relating to the sale, it was some evidence, was relevant and admissible. It could and should have been taken into account. It was however ignored. The value assessed by the municipal valuer and the reduced figure fixed by the valuation court, they both clearly show that it was not taken into account. It is not challenged that the sale was a genuine bargain. The difference between the original value assessed by the municipal valuer and the valuation court's reduced figure and the price realised on sale of Chester House is so huge that in the words of Denning, M.R., in *Cardiff Rating Authority and Assessment Committee v. Guest Keen Baldwin's Iron and Steel Co. Ltd.* (8) ([1949] 1 K.B. at p. 395):

“the figure is so obviously wrong that it must have been reached by an incorrect method”

or to use the language of Danckwerts, L.J., in *Ex parte Peachey Property Corporation Ltd.* (2) ([1965] 3 W.L.R. at p. 446):

“I would say that in the present case the results are so incomprehensible that some incorrect method or incorrect use of material must have been used to produce them.”

As already stated the municipal valuer conceded before the valuation court that plot 1326 was probably overvalued. It is an inside plot which faces on to what the President of the valuation court described as a scruffy lane. Chester House adjoins it but it is further away from the junction of Kenyatta Avenue the principal thoroughfare (Ex. 1).

For the reasons stated I consider that both Appeals no. 47 and no. 50 should be allowed. I therefore make an order remitting them to the valuation court with a direction that the valuation court fix a more realistic value of unimproved land of the two plots involved. Such a course was adopted by the Privy Council in *Toohy's Ltd. v. Valuer General* (7). It is I think a sound step to take as the value of unimproved land can best be ascertained by those whose specialised subject it is or by those within whose experience it more frequently falls.

Costs will be in accordance with the results reached.

Appeal allowed in part. Case remitted to the valuation court with direction to fix a more realistic value in respect of the two plots.

For the appellants:

Hamilton, Harrison & Mathews, Nairobi

H. N. Armstrong

For the respondents:

P. A. Clarke, Nairobi

R. Kapila

**at Dev Sharma trading as Seema Driving School v The Home Insurance
Company of New York
[1966] 1 EA 8 (SCK)**

Division: Supreme Court of Kenya at Nairobi

Date of judgment: 10 December 1964

Case Number: 1191/1962

Before: Farrell J

Sourced by: LawAfrica

[1] Insurance – Personal accident insurance – Group policy of life and accident insurance – Interest of third party in policy – Policy taken out by employer on behalf of himself and his employees – Employee injured in course of employment – Action by employer claiming compensation under policy – Whether employer has insurable interest in subject matter of assurance – Whether action maintainable by employer – Insurance (Life and Accident) Act, 1774, s. 1.

[2] Contract – Parties – Enforcement by third parties – No implied trust.

Editor's Summary

The plaintiff was proprietor of a driving school and entered into the defendant's group policy of life and accident insurance on behalf of himself and his three instructors. The policy provided that in the event of the insured suffering death or disablement the company shall, subject to the terms exceptions and conditions of the policy, pay to the insured or his legal representatives, the compensation specified in the schedule. The first panel of the schedule in the policy set out the name of the insured as "Messrs. Seema Driving School on the lives of Messrs. . . ." and there followed the names of the four driving instructors who were not parties to the policy or the action. During the currency of the policy one of the instructors sustained serious injuries while on duty. The plaintiff, as the policy holder, then sued the defendant claiming compensation specified in the policy and it was contended for the defendant that the action was not maintainable by the plaintiff by virtue of s. 1 of the Insurance (Life and Accident) Act, 1774, as he had no insurable interest in the subject matter of the policy.

Held –

- (i) the policy on its true construction was a policy taken out by the plaintiff as employer for the benefit of the named employees, and the plaintiff had no insurable interest in the subject matter of the policy;
- (ii) there was no constructive or implied trust under which the plaintiff was trustee on behalf of the employees.

Action dismissed.

Cases referred to in judgment:

- (1) *Hodson v. Observer Life Assurance Society* (1857), 26 L.J.Q.B. 303.
- (2) *Lloyd's v. Harper* (1880), 16 Ch.D. 290.
- (3) *Vandepitte v. Preferred Accident Insurance Corporation of New York*, [1933] A.C. 70.
- (4) *Green v. Russell*, [1959] 2 Q.B. 226; [1959] 2 All E.R. 525.
- (5) *Re Schebsman*, [1944] Ch. 83.

Judgment

Farrell J: The plaintiff is the proprietor of a motor driving school, in which he employs three driving instructors besides himself. In view, no doubt, of the measure of risk involved in the occupation, he took out what is known as a group policy of life and accident insurance on behalf of himself and his employees with the defendant company. During the period of the insurance one of the instructors named Mohamed Sadik met with an accident while a passenger in a vehicle proceeding along the Mombasa Road from

Nairobi to Embakasi airport. He sustained serious injuries and has not been able to resume his previous occupation. In this suit the plaintiff as the policy holder sues the defendant company for the compensation specified in the policy as payable in the event that happened, viz., in respect of temporary disablement at the rate of £15 per week for a period of 100 weeks, and medical expenses amounting to fifteen per cent. of the weekly compensation, making a total of £1,725. There is no dispute as to the injuries suffered or the amount due in the event of liability being established, and the sole issue is whether the plaintiff is entitled in law to claim under the policy.

The contract of insurance is set out on a printed form headed "Personal Accident Insurance" and provides that in the event of the insured suffering death or disablement the company shall, subject to the terms exceptions and conditions of the policy, pay to the insured or to his legal personal representatives the compensation specified in the schedule.

The first panel of the schedule sets out the name of the insured as "Messrs. Seema Driving School on the lives of: Messrs . . ." and there follow the names of the four driving instructors. After the address the occupation of the insured is given as "driving instructors". There follows a panel containing details of the period of insurance and the premium. The last panel has a printed heading "The Benefits" (to which have been added in typescript the words "per person") and contains details of the amounts payable in the various events specified.

The first question which arises on a consideration of the policy is, what on its true construction is intended by the expression "the insured"? For the plaintiff it is argued that it was he who signed the proposal and paid the premium, and the name under which he trades is entered as the name of the insured. On the other hand it is clear that a driving school cannot suffer death or personal injuries. The policy is expressed to be "on the lives" of the four driving instructors, and the compensation is expressed to be payable inter alia in the event of "the insured" suffering death or disablement. It seems clear that in that context, at any rate, the insured means the persons on whose lives the policy has been taken out. The same inference is clearly to be drawn from the language used in two of the exceptions which were at first relied on by the defendant, under which liability is excluded in respect of death injury or disablement consequent upon,

- "(b) the Insured being under the influence of or being affected (temporarily or otherwise) by alcoholic drugs venereal disease or insanity;
- (c) The Insured wilfully exposing himself to needless peril (except in an attempt to save human life) or the Insured committing or attempting to commit suicide whether felonious or not."

It appears beyond argument that every reference to "the insured" in the body of the policy is intended to be a reference to the persons on whose lives the policy is taken out, and this ill accords with the description of the insured in the schedule as the Seema Driving School. In a similar policy to which I shall later refer, the policy holder, the person who signed the proposal and paid the premium, is referred to as "the insured", and the persons for whose benefit the policy was taken out are referred to as "the insured persons". Such a distinction makes for greater consistency and clarity, but, as will appear, does not remove the fundamental difficulty which arises when such a policy is taken out by one person on the lives and for the benefit of others.

The difficulty arises from the provisions of the Insurance (Life and Accident) Act, 1774. That this is a statute of general application and as such in force in this country is agreed by counsel on both sides, and I can see no reason to disagree with their opinions.

The Act, which aimed at the mischief of insurances by way of gaming or wagering, by s. 1 avoided policies in which the assured has no insurable interest in the subject matter of the assurance. Section 2 makes it illegal to enter into a policy without inserting in it the name of the person or persons interested. Section 3 restricts the amount recoverable to the value of the interest at the time the insurance is affected. Section 4 excludes from the scope of the Act insurances on ships, goods and merchandise. The enactment which applies primarily to policies on lives, extends to personal accident insurance: 22 Halsbury's Laws (3rd Edn.), p. 278.

There is no suggestion that the policy under consideration was in any sense a gaming or wagering contract; but it is well established that the statutory provisions apply even to a contract which is clearly outside the mischief of the statute: *Hodson v. Observer Life Assurance Society* (1), ((1857) 26 L.J.Q.B. at p. 304, per Coleridge, J.). With regard to the requirements of s. 2, it is submitted on behalf of the plaintiff that the names of the persons interested have in fact been inserted in the policy, and I think the submission is good. The contrary was held in *Hodson's* case (1), but that case is distinguishable as it was expressly recited in the policy that the person interested was the plaintiff, and not the person on whose life the policy was taken out.

But if the plaintiff can surmount any obstacle presented by s. 2 of the Act, that is of no help to him in face of s. 1. The section omitting immaterial words, reads as follows:

"No insurance shall be made by any person on the life of any person or on any event wherein the person for whose benefit or on whose account such policy shall be made shall have no interest."

Now in this case the insurance was undoubtedly "made" by the plaintiff, and according to the section it must be shown that the plaintiff had an insurable interest in the subject matter of the policy. This the plaintiff has been unable to show, since the benefits under the policy are clearly intended to pass to the employees in the event of death or injury, and are not intended to secure the plaintiff against any liability in respect of their employment. It is well established that an insurable interest must be a pecuniary interest and "its amount is measured by the pecuniary loss which the person for whose benefit the insurance is effected is likely to sustain by reason of the death of the life insured": 22 Halsbury's Laws at p. 279. "Moral obligations owed to the assured are not sufficient to sustain an insurable interest": MacGillivray on Insurance Law (5th Edn.) Vol. I, para. 405.

By these tests the plaintiff has no insurable interest in the subject matter of the policy. On the other hand each of the persons for whose benefit the policy has been taken out has an insurable interest, and if these persons had entered into the policy and taken out the insurance in their own names, there could be no dispute about their entitlement to claim in the events specified. But those persons are not the claimants, and the question arises by what right the plaintiff is entitled to claim the benefit of the policy.

It seems that the only way in which the plaintiff might escape the disabling provisions of s. 1 of the Act and establish his right to enforce the contract would be by showing that he ought to be regarded as a trustee for the persons for whose benefit the contract must be assumed to have been made. If a trustee relationship could be established, the injured party as cestui que trust could call upon the plaintiff as trustee to sue on his behalf, and if he refused could himself sue joining the trustee as a defendant.

It is not clear from the arguments whether it was intended that this point should be taken on behalf of the plaintiff. There is no reference to it in the opening. It was first suggested in cross-examination of the plaintiff, who, in fact, denied that

he had contracted as trustee. In his closing address, counsel for the defendant pointed out that the plaintiff does not purport to sue as trustee, and suggested that the only possible claimant in law or equity would be the injured party. Counsel for the plaintiff, while deprecating that any notice should be taken of the opinion of a layman (meaning the plaintiff) as to the effect of the policy, pointed out that the injured person was a stranger to the contract and submitted that on common law principles the only person entitled to sue was the plaintiff.

There is undoubtedly a line of authorities which supports the proposition that where a contract is made with A for the benefit of B, A can sue on the contract for the benefit of B and recover all that B could have recovered if the contract had been made with B himself. See *Lloyd's v. Harper* (2). The basis of the principle is that A must be regarded as trustee for B under an implied trust. The principle is recognised in *Vandepitte v. Preferred Accident Insurance Corp'n. of New York* (3), ([1933] A.C. per Lord Wright at p. 79), where, however, it is suggested that the intention to constitute the trust must be affirmatively proved, and cannot necessarily be inferred from mere general words in the policy. This case was referred to by counsel for the defendant company. But, while the general principle is recognised, it cannot, I think, be prayed in aid in circumstances such as exist in this suit in view of a recent decision of the Court of Appeal in England to which neither counsel found occasion to refer, viz., *Green v. Russell* (4). The case was concerned with a policy very similar to the policy in the instant case. I take the following statement from the headnote:

“In 1951 an employer took out a personal accident group insurance policy which, after reciting ‘Whereas the insured is desirous of securing payment of benefits as hereinafter set forth to any insured person,’ provided that ‘if . . . any insured person shall sustain ‘bodily injury’ resulting in death, the insurance company should pay a specified sum, and that ‘the company shall be entitled to treat the insured as the absolute owner of this policy and shall not be bound to recognise any equitable or other claim to or interest in the policy and the receipt of the insured . . . alone shall be an effectual discharge.’ The policy described the employer as the ‘insured’ and named as the ‘insured persons’ certain of his employees. Those employees knew of the existence of the policy but it formed no part of the terms of their employment, nor did the employer undertake any obligation to maintain or renew the policy.

In 1955 one of the employees named as an ‘insured person’ died in a fire which occurred on the employer’s premises. The employee’s mother brought an action under the Fatal Accidents Acts in which liability was admitted and damages were agreed at £1,300. On the question whether a sum of £1,000 paid under the policy by the insurance company in respect of the death to the employee’s solicitors and paid or about to be paid by them to the employee’s mother was a benefit arising out of the death which should be taken into account and deducted from the agreed damages:

- (1) that the deceased employee had no right at law to the policy moneys, since he was not a party to the contract of insurance and therefore could not sue upon it . . .
- (2) That the mere intention to provide benefits was insufficient to create a trust, and accordingly the deceased employee did not have any equitable interest in the policy moneys . . .

On the main issue under the Fatal Accidents Act, it was held that irrespective of the legal rights under the policy, the money actually paid did not fall to be deducted from the agreed damages, as it fell within the description of ‘money paid or payable on the death of the deceased under any contract . . . of insurance’.”

In rejecting the contention that there was a trust in favour of the deceased, Romer, L.J. ([1959] 2 Q.B. at p. 241), cited the following dictum of Lord Greene, M.R., in the earlier case of *In re Schebsman* (5) ([1944] Ch. at p. 89):

“It is not legitimate to import into the contract the idea of a trust when the parties have given no indication that such was their intention. To interpret this contract as creating a trust would, in my judgment, be to disregard the dividing line between the case of a trust and the simple case of a contract made between two persons for the benefit of a third.”

Green v. Russell (4) is also referred to by MacGillivray (loc. cit. Vol. 2 at p. 559) under the heading of *Group Insurance*, i.e., “where an employer, with intent to benefit his employees, takes out a group policy of life or accident insurance on their behalf”. After setting out the facts of the case the commentary proceeds in para. 1144 at p. 560:

“The further question, whether in a case in which the employer has no interest legal or equitable in the policy moneys, there is such an insurable interest as the Life Assurance Act, 1774, requires, did not fall to be considered. It is submitted that there probably is not, for the form of the policy makes it clear that it is the employee’s interest which is being insured, and not either the employer’s interest, such as it may be, in the freedom of his staff and workmen from death or injury, or his liability for any accidents which may befall them in the course of their employment, which is always covered by a different form of policy.”

In the light of the authorities to which I have referred, I hold that the policy on its true construction was a policy taken out by the plaintiff as employer for the benefit of the named employees, and that the plaintiff had no insurable interest in the subject matter of the policy. There was no constructive or implied trust under which the plaintiff was a trustee on behalf of the employees, nor does he claim in such capacity. With regard to the alternative plea put forward by counsel for the defendant company that, if it should be held that the plaintiff had any insurable interest, it was limited to the loss of the employee’s services during the period of the notice which would be required, namely, one month, in view of my finding that the plaintiff had no insurable interest this point does not arise, and in any case having regard to the way the claim is presented. I do not think it would be open to the plaintiff to make any claim of this nature. It follows that the claim fails by reason of the provisions of s. 1 of the Act of 1774.

I nevertheless think it proper to make certain observations of a general nature. It is clear that the policy is of a type that is not infrequently issued (see MacGillivray loc cit.). The defendant company, which must be assumed to be familiar with the law, has accepted the plaintiff’s premium and has nevertheless thought fit to repudiate liability to make the specified payments, although it does not dispute that the event which happened is clearly one of the risks intended to be covered by the policy. I have no knowledge what is the general practice of insurance companies in similar cases, but in at least one such case (*Russell v. Green* (4)) the insurance company very properly thought fit to honour the policy though, if the view expressed in MacGillivray is correct, it could if it had chosen have relied on the technical defence provided by the Act of 1774. Whatever the rights and liabilities of the parties may be on a strict application of the law, if a company were to accept a premium with no intention in any circumstances of honouring the policy, it would manifestly lay itself open to a charge of unconscionable behaviour. If these considerations were brought to the notice of the defendants by their legal advisers, it may be that they would

consider themselves under some moral obligation to meet the plaintiff's claim, if only as an act of grace.

For the reasons given the suit is dismissed with costs to the defendant company.

Action dismissed.

For the plaintiff:

J. S. Patel & Parrick, Nairobi

D. N. Khanna and B. Parikh

For the defendant:

Buckley Hollister & Co., Nairobi

Bryan O'Donovan, Q.C. and D. F. Shaylor

Director of Public Prosecutions of Tanzania v Akber Rashid Nathani [1966] 1 EA 13 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	10 January 1966
Case Number:	188/1965
Before:	Newbold VP, Spry and Law JJA
Sourced by:	LawAfrica
Appeal from:	The High Court of Tanzania – Georges, C.J.

[1] *Evidence – Admissibility of document – Cyclostyled loose leaves – Whether an original or a copy – Indian Evidence Act, s. 62.*

[2] *Evidence – Presumption – Document produced in evidence stating position as at a particular date – Whether the position stated can be presumed to exist both before and after that date – Indian Evidence Act, s. 114.*

Editor's Summary

The respondent was the proprietor of a travel agency with two branches, one in Zanzibar and the other in Dar-es-Salaam. The former branch was duly approved by the International Air Transport Association, appeared on its agency list, and was authorised to issue international air tickets, whereas the latter branch not being so approved and listed was not competent to issue such tickets. The respondent was charged and convicted by the Dar-es-Salaam District Court on three counts with forging with intent to deceive a specified E.A.A. air ticket purporting to have been issued in Zanzibar. It was not in dispute that the respondent in each case issued the tickets from the Dar-es-Salaam office, affixed to the ticket a stamp

which was the Zanzibar office stamp and then forwarded to E.A.A. a claim for the commission on the tickets issued. The forgery complained of was the use of the Zanzibar office stamp on tickets issued from Dar-es-Salaam for the purpose of creating the impression that the ticket was issued from the Zanzibar office. At the trial the prosecution called a witness who testified that the Dar-es-Salaam office had not been approved by I.A.T.A. and that if it had been approved it would have appeared in a volume which he produced in evidence as the official agency list. On appeal the High Court held that this loose leaf cyclostyled volume was not an original document and that, as no circumstances had been proved which entitled the prosecution to give secondary evidence, the volume was inadmissible. It further held that the fact that the respondent's Dar-es-Salaam office did not appear on the agency list could not be proved by oral evidence. The offence, it was held, had not been proved and the appeal was accordingly allowed. On further appeal,

Held –

- (i) the loose leaf cyclostyled volume was apparently produced by a process capable of making many other documents uniform with the leaves of the volume produced in evidence; consequently, it was admissible as an original by virtue of s. 62 of the Evidence Act;

- (ii) though the dates charged in the counts were either shortly before or shortly after February 1, 1965, the trial magistrate, was, in the circumstances, entitled to presume under s. 114 of the Evidence Act that the position was the same on each date charged in any count as that shown in the agency list on February 1, 1965;
- (iii) the trial magistrate was justified in coming to the conclusion that the Dar-es-Salaam office was neither approved nor listed at the relevant dates.

Appeal allowed. Order of High Court set aside and convictions of the resident magistrate restored, but sentences varied.

Cases referred to in judgment:

- (1) *Kanji v. R.*, [1961] E.A. 411 (C.A.).

Judgment

Newbold VP, read the following judgment of the court: The respondent was convicted by the resident magistrate in the Dar-es-Salaam District Court on three counts of forgery and was sentenced on each count to twenty-one months' imprisonment, the sentences to run concurrently. On appeal to the High Court the Chief Justice set aside the convictions and quashed the sentences. From that decision the Director of Public Prosecutions has appealed to this court on question of law relating to the admissibility of evidence.

The relevant facts are that the respondent was the proprietor of a travel agency with two branches, one in Zanzibar and the other in Dar-es-Salaam. East African Airways (hereinafter referred to as E.A.A.) is a member of the International Air Transport Association (hereinafter referred to as I.A.T.A.). Under the eighth amendment to the I.A.T.A. Passenger Sales Agency Agreement a travel agency may only, as an agent for a carrier such as E.A.A., issue international air tickets from an office which is "duly approved by I.A.T.A. and appearing on the agency List". The office of the branch of the respondent's travel agency at Zanzibar was so approved and listed; and the respondent's travel agency, in respect of the Zanzibar office, was appointed by E.A.A. as its agent for the sale of international air tickets. The office of the branch at Dar-es-Salaam was, according to the prosecution, neither so approved nor listed; and consequently that office was not competent to issue international air tickets. On the sale of an air ticket a travel agency obtains a commission. Each of the three counts charged the respondent with forging with intent to deceive on a specified day a specified E.A.A. air ticket purporting to have been issued in Zanzibar. The evidence in relation to each count was not in dispute. It was that the respondent in each case issued the international air ticket from the Dar-es-Salaam office, affixed to the ticket a stamp which was the Zanzibar office stamp, and then forwarded to E.A.A. a claim for the commission on the ticket issued. The air ticket forms in blank were supplied by E.A.A. to the Zanzibar office, which in turn supplied some to the Dar-es-Salaam office. When an international air ticket was sold the blank form was filled in by the respondent or an employee with the name and destination of the traveller and in a space headed "Date and place of issue of this ticket" there was inserted, on the respondent's instructions, the impression of a stamp which had the name of the respondent's travel agency, its postal address in Zanzibar, and a code number which had been allocated by I.A.T.A. exclusively to the respondent's Zanzibar office. The effect of this was to give the impression that the ticket had been issued from the Zanzibar office. One original of the stamp was kept in the Zanzibar office and another in the

Dar-es-Salaam. office. The forgery complained of was the use of the Zanzibar office stamp on tickets issued from the Dar-es-Salaam office for the purpose of creating the impression that the ticket was issued from the Zanzibar office.

In order to prove that the respondent's Dar-es-Salaam office was neither approved by I.A.T.A. nor appearing in the agency List the prosecution called a Mr. Arkle. He was the Tariff Manager of E.A.A. and the Secretary for East Africa of the I.A.T.A. Agency Investigation Board, which apparently makes recommendations to the Headquarters of I.A.T.A. in relation to, inter alia, applications by travel agents seeking approval by I.A.T.A. of offices and their appearance in the agency List. Mr. Arkle stated in evidence that the Dar-es-Salaam office was not so approved, that the respondent had applied on a number of occasions for it to be so approved but that up to the time when he was giving evidence such approval had not been granted, that if it had been approved it would appear in a volume which he produced as being the official agency List, and that it did not so appear. The volume which he produced without objection was a loose leaf cyclostyled volume which is entitled "Agency List" and purports to have been issued by I.A.T.A. in Paris on February 1, 1965, as the 7th Edition. The resident magistrate accepted the volume as being admissible and as proving, in conjunction with the evidence of Mr. Arkle, that the respondent's Dar-es-Salaam office was neither approved nor appearing on the agency List. On appeal the Chief Justice held that the volume was clearly not an original document and, as no circumstances had been proved which entitled the prosecution to give secondary evidence of the document, the volume was inadmissible in evidence. The Chief Justice also held that the fact that the respondent's Dar-es-Salaam office did not appear on the agency List could not be proved by Mr. Arkle's oral evidence. As this fact had not been proved the Chief Justice held that the offence had not been proved and he allowed the appeal and set aside the conviction.

By s. 64 of the Indian Evidence Act as applied to Tanzania, a document must, except in the cases referred to in s. 65, be proved by primary evidence. By s. 62 primary evidence means the document itself. That section also provides that where a number of documents are all made by one uniform process such as printing each is primary evidence of the contents of the rest, but where they are copies of a common original they are not primary evidence of the contents of the original. The document produced in this case is a loose leaf volume apparently produced by a process capable of making many other documents uniform with the leaves of the volume produced. The Chief Justice stated that the document was clearly not an original nor was it authenticated in any way. With respect to the Chief Justice it is not clear why he considers that it was not an original document nor why he considers that it was not authenticated in any way. As regards the authentication it was produced by the secretary of the I.A.T.A. Agency Investigation Board for East Africa as the "official list of agency" for Africa and it purports on its face to be the I.A.T.A. Agency List. It is not clear what further authentication is necessary. As regard the question of it being a copy and not an original, it is not clear of what the Chief justice considers it to be a copy. There is no suggestion that there exists a signed or certified original and we consider, in the absence of evidence to that effect, that it is extremely unlikely that any such signed or certified original exists or ever existed. There are probably a considerable number of precisely similar documents in existence all made by a uniform process and all therefore originals. It may well be that in one or more countries throughout the world there is an officer whose duty it is to amend and keep up to date a particular volume. But by that very fact the other documents are not copies of the amended document; nor, by virtue of an amendment to a particular document, do the other documents cease to be originals – they continue to be originals of the particular edition of the document. From time to time, doubtless cyclostyled leaves with the amendments incorporated are sent to the holders of these volumes so that these leaves can be inserted in place of the existing relevant leaves. It is for this reason, probably, that the

documents are prepared in loose leaf form. These amended cyclostyled leaves are themselves originals and it is almost certain that the manuscript amended copies of the leaves are destroyed as no longer being of any value once each amended leaf in cyclostyled form has been produced. Be that as it may, there is no evidence that this document is a copy of any other document nor do we see any reason to assume that such is the position. For these reasons we are, with respect, unable to agree with the Chief justice that the document was not properly proved and that there was no evidence that the Dar-es-Salaam office was neither approved nor listed.

It was urged by counsel for the respondent that, even if the document was admissible, nevertheless it did not prove the position as at any date other than February 1, 1965. This submission, of course, goes to the weight of the evidence of the document as opposed to its admissibility, and the question of its weight depends on a number of factors. The dates charged in the counts were either shortly before or shortly after February 1, 1965, and in no case was the period longer than forty days. Mr. Arkle stated that, in spite of repeated requests by the respondent for approval of the Dar-es-Salaam office, it had not been approved. It is only if it had been approved that it would be listed and it was not suggested by the respondent that the Dar-es-Salaam office had either been approved or listed. In the circumstances it seems to us that the resident magistrate was entitled to presume under s. 114 of the Evidence Act that the position was the same on each date charged in any count as that shown in the agency List on February 1, 1965 (see *Kanji v. R.* (1)). We consider, accordingly, that the resident magistrate was justified in coming to the conclusion that the Dar-es-Salaam office was neither approved nor listed at the relevant dates.

It was also urged by counsel for the respondent that there had been no forgery within the meaning of s. 333 and 335 of the Penal Code. The submissions on this issue fall into three parts. First, it was urged that the air ticket was not issued by the respondent's travel agency but by E.A.A. and that the ticket is exactly what it purports to be and is thus not a false document. This submission does not deal with the gravamen of the charge, which is that the ticket purports to be issued in Zanzibar, which it was not. Secondly, it was urged that nothing that was done by the respondent resulted in the making of a false document within s. 335 of the Penal Code. We are satisfied that when the blank form of an air ticket is filled in with the required particulars then the completed air ticket is made. If when completed the air ticket purports to be what in fact it is not, in this case an air ticket issued in Zanzibar which in fact it was not, then the document is a false document which has been made by the insertion in the blank form of the particulars. Finally, it was urged that the respondent was entitled to do what he did and to regard the document as issued in Zanzibar and to affix the Zanzibar office stamp thereto. The evidence of the secretive manner in which the respondent conducted his international air ticket business at the Dar-es-Salaam office and his repeated requests for the approval of the Dar-es-Salaam office and his repeated requests for the approval of the Dar-es-Salaam office shows clearly that the respondent himself did not believe that to be the position. The belief of the respondent would not, however, be the basis for determining his rights. These would be determined by the terms of his agreements with I.A.T.A. and E.A.A. The stamp used by the respondent in order to make the false document bears a code number. This stamp came into existence as a result of a circular letter to the respondent which appears in the file seized from the respondent's office. In this letter a code number was allocated to the Zanzibar office and it was clear that such code number could be used in respect of no other office. We are satisfied that the respondent was not entitled to use that stamp in the Dar-es-Salaam office and, as we have already stated, we are satisfied that the respondent knew that he was not entitled to use that stamp in the Dar-es-Salaam office. We are also satisfied that the stamp was used with intent to deceive.

For these reasons we are satisfied that the respondent was properly convicted by the resident magistrate and accordingly the order of the High Court on appeal should be set aside and the convictions of the resident magistrate on each of the three counts restored.

As regards sentence, forgery is a heinous crime but the circumstances of this case are peculiar. The respondent was entitled to accept the order for the air ticket in the Dar-es-Salaam office, receive payment there and deliver the ticket there and, ultimately, receive from E.A.A. his commission thereon so long as the ticket was actually made out in the Zanzibar office. This could have been done easily by a letter or telephone call from the Dar-es-Salaam office to the Zanzibar office. Everything that the respondent did could have been done by him in a slightly different manner. For all practical purposes the offence is not in what the respondent did but in his doing it, to speak metaphorically, with his right hand instead of with his left hand. While he nevertheless commits an offence, the whole circumstances may properly be taken into consideration in determining sentence. In all the circumstances, including the other offences which the respondent asked the resident magistrate to take into consideration, we consider that the proper sentence on each count should be a fine of Sh. 500/- or in default one month's imprisonment. Accordingly we impose this sentence on each count in place of that originally imposed by the resident magistrate but no longer in existence by reason of having been quashed by the High Court.

Appeal allowed. Order of the High Court set aside and convictions of the resident magistrate restored.

For the appellant:

The Attorney-General, Tanzania

V. Campbell (Senior State Attorney, Tanzania)

For the respondent:

Fraser Murray, Roden & Co., Dar-es-Salaam

P. J. Wilkinson, Q.C., and A. A. Lakha

**National and Grindlays Bank & Co v Kentiles & Co (in liquidation) and The
Official Receiver (as liquidator)**
[1966] 1 EA 17 (PC)

Division:	Privy Council
Date of judgment:	25 November 1965
Case Number:	13/1964
Before:	Lord Hodson, Lord Upjohn and Lord Wilberforce
Sourced by:	LawAfrica
Appeal from:	E.A.C.A. Civil Appeal No. 21 of 1962 on appeal from Her Majesty's Supreme Court of Kenya – MILES, J.

[1] Mortgage – Land in Highlands – Mortgage to company – Whether company a “person” – Validity in absence of consent – Land Control Ordinance (Cap. 150), 1948, s. 7-Land Control (Amendment) Ordinance, 1949, s. 2 – Crown Lands Ordinance (Cap. 155), 1948, s. 88.

[2] Mortgage – Debenture in favour of mortgagee – Implied obligation to provide memorandum of deposit of title deeds – Whether sufficient to comply with registration provisions – Equitable Mortgages Ordinance (Cap. 152), 1948, s. 2 – Crown Lands Ordinance (Cap. 155), 1948, s. 127(2) and s. 129.

[3] Evidence – Document – Debenture merely creating a right to obtain a memorandum of deposit of title deeds – Whether admissible.

[4] Statute – Construction – Meaning of word person – Whether “person” includes company – Land Control Ordinance (Cap. 150), s. 7 – Crown Lands Ordinance (Cap. 155), 1948, s. 188.

Editor's Summary

Kenboard & Co. owned land in the Highlands of Kenya subject to a mortgage. A scheme was adopted whereby the land was to be transferred to Kentiles & Co. who were to discharge Kenboard's liabilities out of a credit of £90,000 to be allowed by the appellant bank to Kentiles on the security of a debenture charging the assets of Kentiles and of a legal mortgage on the land. Kentiles issued a debenture to the appellant bank, the terms of which required Kentiles to deposit with the bank the title deeds to any present or future acquired immovable property by way of equitable mortgage, and also to execute whenever called upon legal mortgages or charges as the case might require. Accordingly in November, 1951, Kentiles purported to convey the land to the appellant by way of legal mortgage. No consents to the transaction were obtained under s. 7 of the Land Control Ordinance (Cap. 150), 1948, as amended nor under s. 88 of the Crown Lands Ordinance (Cap. 150), 1948. In December, 1951, the title deeds were transferred to the bank which continued to hold them. In 1956 Kentiles presented a petition for winding-up, whereupon the bank appointed a receiver and manager who took possession of the property. In 1958 Kentiles sued the appellant bank claiming a declaration that it was the unencumbered owner of the property and entitled to possession. The appellant counter-claimed for declarations that it was legal mortgagee of the property and that it was entitled to require either Kentiles or the Official Receiver, as liquidator, to deliver a duly executed memorandum of deposit of title deeds. Both the claim and counterclaim were dismissed by the Supreme Court and the Court of Appeal. Before the Privy Council the Bank contended that a company was not a person eligible for the consents under the Land Control and Crown Lands Ordinances, and that the debenture was admissible under s. 129 of the Crown Lands Ordinance to assert the contractual right to call for the execution of a memorandum of deposit of title deeds; on appeal the Privy Council:

Held –

- (i) the proper construction of the word "person" in s. 7 of The Land Control Ordinance as amended included a company so that the absence of any consent under that Ordinance and the Crown Lands Ordinance invalidated the purported grant of the legal mortgage;
- (ii) there was no merger of any equitable mortgage into the invalid legal mortgage;
- (iii) assuming the appellant could adduce admissible evidence, it was entitled by implication under the debenture, to require Kentiles to execute a memorandum of deposit of the title deeds to comply with s. 127(2) of the Crown Lands Ordinance;
- (iv) the debenture was admissible in evidence for the purpose of proving an agreement to call for an equitable mortgage by deposit of title deeds with a memorandum by virtue of s. 129(e) of the Crown Lands Ordinance.

Appeal allowed.

Case referred to in judgment:

- (1) *Denning v. Edwardes*, [1961] A.C. 245.

Judgment

Lord Wilberforce: The issue in this appeal is whether the appellant is entitled, in the liquidation of the respondent Company Kentiles & Co., to rank as a secured creditor in respect of certain immovable property in Kenya. The action was brought by the respondent Company and its Liquidator, the Official Receiver, as plaintiffs against the appellant Bank and one Brice, whom the Bank had purported to appoint as receiver of the property in question, as defendants. The plaintiffs claimed an injunction to restrain the defendants from

entering on the property, a declaration that the Company was the free and unencumbered owner of the property, delivery of possession and other relief. The Bank, as well as resisting this claim, counterclaimed for (1) a declaration that it was a legal mortgagee of the property (2) a declaration that it was entitled to require the Company or its Liquidator to deliver a duly executed memorandum of deposit of the title deeds of the property by way of equitable mortgage to secure advances and (3) other consequential relief.

At the trial it was held by Miles, J., in the Supreme Court of Kenya that the Bank was entitled neither to a legal nor to an equitable mortgage but that it was entitled to appoint a receiver of the property. The claim was accordingly dismissed with costs as was the Bank's counterclaim.

The Bank appealed to the Court of Appeal for Eastern Africa against the dismissal of its counterclaim, the respondents to that appeal being the Company and its Liquidator: the Receiver, Brice, was not a party to the appeal. No similar notice of appeal was given by the Company against the dismissal of its action but in the appeal brought by the Bank the Company delivered a document headed "Notice of Cross Appeal" in which the Company sought to have the judgment of Miles, J., varied by setting aside so much thereof as dismissed the claim and by entering judgment for the Company on the claim and to have the dismissal of the counterclaim affirmed on grounds other than relied on by the judge. This notice was served on the Bank but not on the Receiver.

This procedure gave rise to a preliminary objection by the Bank which, after argument, was overruled by the Court of Appeal. On the substantive appeal, the Bank's appeal against dismissal of the counterclaim was, by a majority decision, dismissed. In relation to the claim, the judgment of Miles, J., was varied by adding to the declaration, that the Bank was not a secured creditor, a provision whereby the Company was to be at liberty to apply to the Supreme Court for an order directing the Bank to terminate the appointment of the Receiver.

The present appeal is brought against the order of the Court of Appeal pursuant to s. 15(2) of the Constitution of Kenya (Amendment) Act, 1965. Although the Company and its Liquidator were duly made respondents, they have not appeared on the appeal which has been argued ex parte on behalf of the Bank.

The facts relevant to the case were proved through certain agreed documents and by a statement of Mr. J. A. Mackie-Robertson, a partner in the firm of Kaplan and Stratton, advocates in Nairobi, which was admitted by consent and not disputed. The Bank is an English Company incorporated under the Companies Act, 1862 which carries on business in Kenya. In September, 1951 proposals were under consideration for the reconstruction of a Kenya Company called "Kenboard Ltd.". This Company was the owner of the property in dispute which is land situated in the Highlands of Kenya. The land was at this time subject to a mortgage in favour of Barclays Overseas Development Corporation Ltd. The proposed reconstruction involved the transfer of the property to the respondent Company, Kentiles & Co., and the discharge by that Company of the liabilities of Kenboard & Co. out of money to be provided by the Bank. The Bank was to allow credit to the Company up to £90,000 on the security of a debenture charging the assets of the Company and a legal mortgage on (inter alia) the property.

On October 1, 1951 the following events took place:

- (1) the property was reconveyed by the existing mortgagees to Kenboard & Co.;
- (2) an agreement to purchase the property from Kenboard & Co. was approved by a general meeting of Kentiles & Co.;

- (3) Kentiles & Co. issued a debenture in favour of the Bank. The relevant terms of this debenture will be referred to hereafter.

In September 1951 the title deeds of the property had been delivered by Barclays Bank (D. C. & O.) & Co., which had been holding them for the Barclays Corporation, to Messrs. Kaplan and Stratton, and on October 5, 1951 the Barclays Corporation released the deeds from their lien. Thereupon Messrs. Kaplan & Stratton considered themselves as holding the deeds to the order of the appellant Bank. On October 20, 1951 Messrs. Kaplan & Stratton applied to the Land Control Board for consent (required under certain legislation to which their Lordships will refer later) to the proposed mortgage of the property to the Bank. On October 31, 1951, the Secretary of the Board wrote that consent was not needed. As will be later explained, this was mistaken: in fact consent was required but at the time the Secretary's advice was accepted and acted upon. On November 1, 1951 the property was conveyed by Kenboard & Co. to the Company and on the same day it was conveyed by Kenboard & Co. to the Company and on the same day it was conveyed by the Company to the Bank by way of legal mortgage; on December 19, 1951 the title deeds were transferred by Messrs. Kaplan & Stratton to the Bank which now holds them. The bank in fact made advances of considerable sums to the Company. The Company presented a petition for winding up on November 19, 1956 and on November 20, 1956 the Bank appointed Mr. Brice Receiver and Manager of the property. He took possession on November 22, 1956. The present proceedings were commenced on May 7, 1958 and the counterclaim was delivered on August 24, 1959.

The first point taken before their Lordships by the appellant Bank was that the Court of Appeal had no jurisdiction to entertain the respondent's appeal to that court, because no substantive notice of appeal was given. In the alternative it was submitted that the appeal ought not in the circumstances to have been entertained. Their Lordships cannot accede to either of these submissions. While accepting that the proper course for the Company to have taken, in accordance with the Rules, was for the Company to have given an independent notice of appeal against the judge's decision, their Lordships consider that the procedure adopted was an irregularity in procedure, to deal with which was entirely within the discretionary power of the Court of Appeal. That court considered and ruled upon the matter and their Lordships can find no basis upon which, at this stage, to interfere with that ruling.

On the substance of the appeal, the first issue between the Company and the Bank is whether the Bank is a legal mortgagee of the property. The Company's claim was that the legal mortgage executed on November 1, 1951 was invalid for two reasons: first because, under the terms of s. 328 of the Companies Ordinance (as it existed when the action was started) the Bank was legally unable to hold a legal estate in land in the Highlands: secondly because the Bank had failed to obtain the consents necessary, in relation to land in the Highlands, under the Land Control Ordinance and the Crown Lands Ordinance. The Bank disputed each of these contentions and further claimed, as regards s. 328 of the Companies Ordinance, that by virtue of an amendment to that section passed before the delivery of the Bank's counterclaim, and pre-existing disqualification had been removed and that although the amendment was expressed not to affect any proceedings commenced before May 13, 1958 (as were the proceedings in the Company's claim) neither that, nor any judgment which might be pronounced on the claim, prevented the Bank from succeeding in its counterclaim even though the result of so doing might be to produce a result directly contrary to the judgment given on the claim.

On all of these points (except as to the impact of the amending legislation on the claim and counterclaim respectively, a question on which divided opinions were given) all the judges in the courts below decided against the present appellants. Their Lordships do not consider it necessary to deal with

more

than one of them, the conclusion as to which appears to them clear and which is sufficient to dispose of the appellants' contention that the legal mortgage was validly created, namely that which arises from the absence of consents under the Land Control Ordinance and the Crown Lands Ordinance. Section 7 of the Land Control Ordinance (c. 150) as amended by s. 2 of the Land Control (Amendment) Ordinance, 1949 (No. 38 of 1949) provides that "no person" shall without the consent of the Land Control Board mortgage or charge any land in the Highlands and s. 88 of the Crown Lands Ordinance (c. 155) contains a similar prohibition against mortgaging land in the Highlands without the consent of the Governor. Each of these sections provides that transactions effected without such consent shall be void. Neither consent was in fact obtained. The contention of the appellants was that although, in accordance with the Interpretation and General Clauses Ordinance (c. 1) the word "person", unless there is something in the subject or context inconsistent with such construction, includes a company, there was such an indication in each ordinance. Generally, it was said that the legislation was of a racial character and that race is a characteristic of individuals: when companies are involved control is exercised not over the corporate body itself but over its shareholders; more particularly it was argued that in s. 90 of the Crown Lands Ordinance which refers to persons "of a different race to the person by whom such land is sold", "person" can only mean "individual" and that consistency of interpretation required that the word "person" should have the same meaning throughout the legislation. Their Lordships recognise that these indications have some force but consider that they are far outweighed by the anomalies which would arise if companies as such were to be exempted from the requirements of the legislation. It is true that there are provisions which enable control to be exercised over changes in the shareholders of landowning companies, but, if the appellant's construction is correct, companies would enjoy a far greater freedom as regards dealings in land in the Highlands than do individuals.

Rather than accept such an anomalous result their Lordships prefer to recognise that the word "person" is used without consistency or accuracy in this legislation, the drafting of which is, indeed, in many respects far from precise, and that the limitation of the word "person" to "individuals" in one context does not impose the same meaning in another. Their Lordships accordingly conclude that consent under each Ordinance was required and that the absence of such consent invalidated the purported legal mortgage. Their Lordships would observe, before leaving this legislation, that there is in each Ordinance a specific exception in favour of equitable mortgages by deposit with (inter alia) the appellant Bank, so that on the alternative head of the Bank's claim (next to be considered) the absence of consents is not fatal.

Their Lordships now consider the Bank's alternative claim to be equitable mortgage by deposit of title deeds. The Bank has since November, 1951 held and still holds the deeds and it has made advances to the Company but this is not sufficient under the law of Kenya to entitle it to be treated as an equitable mortgage of the land.

The law as to equitable mortgages is contained in the Equitable Mortgages Ordinance (c. 152 of the Laws of Kenya) s. 2 which provides as follows:

"Subject to the provisions hereinafter contained nothing in s. 59 of the Indian Transfer of Property Act, 1882 (Act IV of 1882), as applied to the Colony shall be deemed to render invalid mortgages made in the Colony by delivery to a creditor or his agent of a document or documents of title to immovable property with intent to create a security thereon. Such delivery shall, subject to the provisions of the Crown Lands Ordinance, whether made before or after the date of this Ordinance, have the same effect on

the immovable property sought to be charged as a deposit of title deeds in England at the date of this Ordinance.”

Thus, delivery of title deeds, with intent to create a security, may create an equitable mortgage, provided that the provisions of the Crown Lands Ordinance are complied with. These in effect require that a memorandum of the equitable mortgage shall be registered in the registry maintained under the Ordinance.

It is necessary to set out verbatim certain portions of ss. 127 and 129 of the Ordinance which relate to matters of proof.

“127. No evidence shall be receivable in any Civil Court:

- (2) Of a lien, mortgage or charge . . . of or upon such land unless the mortgage or charge is created by an instrument in writing, and the instrument has been registered . . . under this Part.

Provided, however, that nothing hereinbefore contained shall apply to an equitable mortgage by deposit of documents of title provided that a memorandum of such equitable mortgage shall have been registered in the register . . . Every memorandum shall be transmitted to the registry in duplicate and shall be in such form . . . as may be prescribed.”

“129 Nothing in [s. 127] shall apply to:

- (e) any document not itself creating, declaring, assigning, limiting or extinguishing any right, title or interest to or in land registered under this Part, but merely creating a right to obtain another document which will, when executed, create, declare, assign, limit or extinguish any such right, title or interest; or . . .”

The substance of the Bank’s claim is that it is entitled to require the Company to execute and deliver to it a memorandum sufficient to enable it to comply with s. 127(2) of the Ordinance. This claim rests upon cl. 1 and 2 of the Debenture which are in the following terms:

- “(1) The Company hereby charges with the payment and discharge of all moneys and liabilities intended to be hereby secured (including expenses and charges arising out of or in connection with the acts authorised by cl. 5, 8 and 9 hereof) ALL its undertaking goodwill assets and property whatsoever and wheresoever both present and future including its uncalled capital for the time being.
- (2) The charge created by this Debenture shall rank as a first charge on all the property hereby charged and as regards all immovable property of the Company (to be mortgaged as hereinafter provided) shall constitute a fixed charge and as regards all other property hereby charged shall constitute a floating security but so that the Company is not to be at liberty to create any mortgage or charge upon any of the property comprised in this security to rank either in priority to or *pari passu* with the charge hereby created. The Company shall forthwith upon the execution of this Debenture deposit with the Bank the title deeds of any immovable property which may hereafter be acquired by the Company (all such deposits of title deeds being by way of equitable mortgage as collateral security for the repayment of the principal moneys and interest hereby secured) and shall at its own expense whenever called upon by the Bank so to do execute legal mortgages or charges as the case may require in favour of the Bank over any such immovable properties.”

On these provisions two questions arise: first (a question of construction) whether they give rise to an obligation on the Company to provide the Bank with the requisite memorandum of deposit; second (a question of law) whether the Bank can put the relevant provision in evidence, having regard to s. 127 of the Ordinance.

In dealing with these questions it is necessary to appreciate that cll. 1 and 2 of the Debenture are comprehensive provisions intended to deal with a number of separate cases, viz., with movable property on the one hand and immovable property on the other and, within the category of immovable property, with that which was “vested in the company” at the date of the Debenture on the one hand and, on the other, with future acquired property. It is to property within the last mentioned category that the Bank’s claim relates. With respect to this the obligations undertaken by the Company were (a) to deposit the title deed by way of equitable mortgage and (b) when called on, to execute a legal mortgage.

Admittedly there is here no express obligation to execute a memorandum of deposit, but since under the law of Kenya no valid equitable mortgage could be created without a memorandum, their Lordships have no difficulty in finding that the Company impliedly agreed to provide one since without such an implied obligation the contract would be ineffective. This obligation was not affected in any way by the Company’s purported grant of a legal mortgage: this was (for the reasons already given) simply a nullity, and the ineffectual attempt to grant it cannot diminish the Company’s obligation either to create an equitable mortgage or, on demand, to execute a valid legal mortgage. Provided that the necessary evidence is available, the Bank is fully entitled now to insist on security of one kind or the other.

This being then, as their Lordships construe the Debenture, the nature of the Company’s obligation, can the Bank adduce evidence of it? This is an issue of some difficulty upon which the learned judges in the courts below were not agreed. In the first place, their Lordships are of opinion that what is prohibited by s. 127 is evidence (other than by a written document) of particular transactions, i.e., in this case, evidence of “a lien, mortgage or charge”. The fact that a particular document may, inter alia, create a lien mortgage or charge does not prevent a party from putting the document in evidence so long as the purpose for which he does so is not to prove a lien, mortgage or charge but some other purpose not referred to in the prohibitory clause, in this case s. 127(2). This is the effect of the decision of their Lordships in *Denning v. Edwardes* (1). There Viscount Simonds, delivering the judgment of the Board, distinguishing the corresponding Indian Act (Indian Registration Act, 1908) which made inadmissible the document itself, expressed his agreement with the opinion expressed by the learned President of the Court of Appeal for Eastern Africa in which he said ([1961] A.C. at p. 252):

“What is rejected by s. 127 is not the unregistered instrument per se in so far as it is to be received as evidence of any transaction affecting immovable property, but evidence of certain specified transactions and of those only.”

It follows that the Debenture is not per se inadmissible merely because it creates a charge on certain immovable property (viz., that vested in the Company) and that the question is whether when the Bank seeks to use it to enforce an obligation to execute a memorandum of deposit of title deeds it is doing so for a prohibited purpose.

In their consideration of this issue, the learned judges in the courts below were, up to a point, as their Lordships understand the judgments, agreed. They accepted that if, after the date of execution of the Debenture, the Company

had become the owner of immovable property and had received the title deeds, the Bank could have relied upon the Debenture to enforce the Company's obligation to deposit the deeds and execute a memorandum. Miles, J. considered that the Debenture, in so far as it related to future acquired property, not only need not be registered but could not be registered and that at most it came within s. 129(e) of the Crown Lands Ordinance. In the Court of Appeal, Crawshaw, J. (who dissented in his ultimate conclusion from the majority) held that the Debenture contained a provable agreement to call for an equitable mortgage by deposit and that if the deeds were with the respondents the appellant could call on them to deposit them and supply a memorandum of deposit. The opinion of Gould, Ag.-P. was that if the Bank (having lent or agreed to lend money) were seeking enforcement of a right to a deposit of documents of title and a memorandum they would have been entitled to do so, and the agreement to that effect would have been admissible in evidence. Newbold, J., did not expressly deal with this point. Before their Lordships, the appellants, submitting that these opinions were correct, referred to ss. 58 and 59 of the Indian Transfer of Property Act, 1882 (which as the Kenya Equitable Mortgages Ordinance makes clear has been adopted as the basic legislation as to mortgages in Kenya) and to certain cases decided thereunder, as supporting their argument. Not having heard argument on the other side and not having the benefit of the opinions of the courts below upon them, their Lordships will not comment upon these provisions nor upon the cases cited: they consider it sufficient to say that for the purposes of the present case they see no reason to differ from the opinions expressed, so far without disagreement, by the learned judges below and they resume the argument at the point where the judgments appealed from begin to differ. Miles, J. held that the Bank's claim ultimately failed because of the execution on November 1, 1951 of a legal mortgage and because the lower security (viz., of an equitable mortgage) would merge in the higher. This argument was not upheld in the Court of Appeal and their Lordships cannot agree with it: the legal mortgage was, in the event, invalid: the Bank acquired no title, legal or equitable, under it and in their Lordships' view the rights of the Bank must be considered as if it had not been made.

In the Court of Appeal, Gould, Ag.-P. held that the Bank's claim to a memorandum depended upon their being able to prove that they held the documents of title under an equitable mortgage. But the Bank's claim, as their Lordships understand it, was founded not upon the deposit but upon the implied agreement contained in cl. 2 of the Debenture to execute a memorandum. If this implied agreement could be proved and given effect to upon receipt of the documents of title by the Company before their deposit with the Bank, their Lordships do not appreciate how these rights could have been lost to the Bank once the documents were deposited with it. The fact of deposit with intent to create a charge was not the foundation of the Bank's case for execution of a memorandum: all that needed to be proved was the contract created by the Debenture. Their Lordships agree with Crawshaw, J. when he said:

"The crux of this matter is, as I see it, not whether possession of the deeds created an equitable charge (proof of which is restricted by s. 127), but whether the Debenture contains a provable agreement to call for an equitable mortgage by deposit with a memorandum. In my opinion it does. If the deeds were with the respondents the appellant could call on them to deposit them and supply a memorandum therewith. It is not in dispute that the deeds are already in the possession of the appellant (in whatever capacity that might be) and so all it has now to do is to demand the memorandum to which, in my view, it is entitled."

Their Lordships are therefore of opinion that the Bank is entitled to succeed in its counterclaim in so far as it sought to establish and enforce an obligation

on the Company to execute and deliver a memorandum of deposit. They would add that no point was pleaded nor it appears taken in either court below to the effect that the Bank's right to relief under this head was affected by the liquidation of the respondent Company and their Lordships can only proceed upon the basis that this was not the case.

The appeal will therefore be allowed. The order of the Court of Appeal for Eastern Africa will be set aside and the order of the Supreme Court of Kenya will be varied by substituting for that portion thereof whereby the appellant's counterclaim was dismissed (1) a declaration that the appellant is entitled to require the respondents to deliver a memorandum of deposit of the title deeds of the property referred to in para. 4 of the Plaint sufficient for registration and to satisfy the proviso to s. 127 of the Crown Lands Ordinance (2) an order that the Official Receiver as Liquidator of Kentiles & Co. forthwith prepare executes and delivers or procures the preparation execution and delivery by Kentiles & Co. of such memorandum at the expense of Kentiles & Co. The appellant will have liberty to apply to the High Court for an account of the moneys due to the appellant on the security of the Debenture referred to in the counterclaim. The respondent Company must pay the appellant's costs of this appeal and in the courts below such costs to be added to the debt secured by the Debenture.

Appeal allowed.

For the appellant:

Sanderson, Lee Morgan Price & Co., London

John Donaldson, Q.C., and Oliver Smith

The respondent did not appear and was not represented.

Paul Donnebaum v Kurt Mikolaschek

[1966] 1 EA 25 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	1 February 1966
Case Number:	423/1965
Before:	Farrell J
Sourced by:	LawAfrica

[1] *Practice – Service outside jurisdiction – Failure to show cause of action likely to succeed – Failure to make full and fair disclosure on ex parte application for leave to serve – Civil Procedure (Revised) Rules, 1948, O. V, r. 21(f) and r. 23 (K).*

[2] *Practice – Application for leave made ex parte – Service outside jurisdiction – Failure to make full and fair disclosure – Service set aside.*

Editor's Summary

The plaintiff had on an ex parte application obtained leave to serve summons out of jurisdiction under O. V, r. 21(f) of the Civil Procedure (Revised) Rules, 1948 on the ground that the suit was founded on a libel committed within Kenya. Having been served with the summons the defendant made this application before entering an appearance to set aside the service of the summons contending that r. 23 had not been complied with. In his plaint the plaintiff had averred that the defendant had libelled him in a letter to one Moser in Austria and to one Lowis in Kenya, and in his affidavit in support of the application for leave to serve the summons out of jurisdiction, counsel for the plaintiff averred that the cause of action was founded on a libel published inter alia in Kenya. At the hearing it was admitted by counsel for the plaintiff that it was not alleged that the defendant wrote directly to Lowis but that the original letter was sent to a Dr. Portschi in Austria who passed it on to Moser who in turn sent it to Lowis because Lowis was mentioned in it. Besides considering

whether there had been sufficient disclosure in the ex parte application the court considered whether the plaintiff had prima facie a good cause of action in the circumstances.

Held –

- (i) the plaintiff had not shown that in respect of the republication to Lowis he had a cause of action which could properly be described as probable of success;
- (ii) the plaintiff, on his ex parte application for service of summons out of jurisdiction, had not made a full and fair disclosure, which alone would justify setting aside the order.

Objection allowed. Service set aside and order allowing such service discharged.

Cases referred to in judgment:

- (1) *The Hagen*, [1908] P. 189.
- (2) *The Brabo*, [1949] A.C. 326.
- (3) *Société Generale de Paris v. Dreyfus Brothers* (1887), 37 Ch.D. 215.
- (4) *Johnson v. Taylor Bros.*, [1920] A.C. 144.

Judgment

Farrell J: This is an application to set aside service of a summons on the defendant in Tanzania pursuant to an order of this court granted on ex parte application on May 28, 1965, allowing service out of the jurisdiction on the ground that the plaint is founded (inter alia) on a tort, viz., publication of a libel, committed within the jurisdiction. The plaint in para. 3 sets out the terms of a letter alleged to have been written by the defendant to one Dr. Hugo Portisch in Vienna. Further publication is alleged in para. 4 which reads as follows:

“The defendant further wrongfully and maliciously wrote and published or caused to be wrote (sic) and published the aforementioned words to one Kurt Moser at Vienna, Austria, and to one Mr. E. Lowis at Nairobi, Kenya.”

The affidavit sworn by counsel for the plaintiff in support of the application for leave to serve the summons out of the jurisdiction contained the following averment:

“That I verily believe that the Plaintiff has a good cause of action herein, which cause of action is founded on libel published inter alia at Nairobi in Kenya.”

The various circumstances in which leave may be given to serve a summons out of the jurisdiction are set out in O. V, r. 21, of the Civil Procedure (Revised) Rules, 1948, and one of the cases mentioned is para. (f), viz. (whenever)

“(f) the suit is founded on a tort committed within (Kenya).”

On the material before him the learned judge considered that a prima facie case had been made out and granted leave.

The defendant having been served pursuant to the leave so granted has now been able to brief counsel, and though no appearance has yet been entered, he has, according to the normal procedure in such cases, an opportunity to show, if he can, by evidence and argument, that the leave originally granted on ex parte

application should, not, having regard to all the circumstances, have been given, and that the service should be set aside.

Although little or no evidence was adduced in support of the application, a considerable amount of information was put before the court as to the background of the present proceedings and the nature of the plaintiff's case which if it had been available at the time of the original application might have materially influenced the court in its decision. It appears now that a previous suit (C.C. No. 341 of 1964) was filed by the plaintiff against the defendant on substantially the same allegations. In that case leave was given under para. (C) of r. 21 to serve the summons on the defendant out of the jurisdiction as being a person ordinarily resident in Kenya, but the service was set aside by Rudd, J., on the ground that such ordinary residence had not been established. The plaint in that case had not in terms alleged publication of the libel in Kenya, but the affidavit in support had done so, and the point was raised in argument, and briefly touched on by the learned judge in his ruling, when he said:

"The affidavit supporting the application for leave to serve out of the jurisdiction avers that the libel was published in Kenya, but it does not aver that this publication was by the defendant or that the defendant was responsible for the publication in Kenya. In the circumstances I do not think that sufficient ground was shown to justify the order for service out of the jurisdiction."

After the service in the earlier suit had been set aside, the suit was withdrawn and the plaintiff instituted a fresh suit and applied for leave to serve the summons out of the jurisdiction on the different ground that the suit was founded on a tort committed within the jurisdiction. It might have been expected that on this occasion the circumstances by which it was sought to justify service out of the jurisdiction would have been made abundantly clear in the new proceedings, having regard to the remarks made by the learned judge on the previous application. I have already set out the terms of para. 4 of the plaint, and it is manifest that no attempt has been made to clarify the points referred to in the ruling. It might indeed be thought that the pleading was deliberately designed to conceal the true case sought to be put forward by the plaintiff, since it now appears from the belated admission of his counsel, that the letter in question was not in the first place published in Kenya by the defendant, but was republished by Mr. Moser to Mr. Lowis in circumstances in which the plaintiff submits that the defendant is responsible for the republication.

The manner in which a pleading is drafted is primarily a matter inter partes, and where there is ambiguity the other party has his remedy by application for further and better particulars. But where a party comes before the court with an ex parte application he has an obligation not only to his opponent but to the court. As Farwell, L.J. said in *The Hagen* (1) ([1908] P. at p. 201):

"The second point which we considered established in the cases was this, that, if on the construction of any of the sub-heads of Order XI "(which corresponds to Order V, r. 21)" there was any doubt, it ought to be resolved in favour of the foreigner; and the third is that, inasmuch as the application is made ex parte, full and fair disclosure is necessary, as in all ex parte applications, and a failure to make such full and fair disclosure would justify the Court in discharging the order, even although the party might afterwards be in a position to make another application."

The question is, was there full and fair disclosure on behalf of the plaintiff in the present case? Certainly not in the pleadings which give no indication of the circumstances of the alleged publication to Mr. Lowis; and certainly not in the affidavit in support which makes no attempt to give any clear answer to the questions which troubled Rudd, J., in the earlier proceedings.

On the authority of *The Hagen* (1) that alone would justify the setting aside of the order. But quite apart from what I have found to be some lack of candour in the presentation of the application, I think the same conclusion must be reached if the matter is considered on its merits in the light of the fuller information now before the court. The granting of leave is discretionary, and even if an applicant is able to bring his application within the strict terms of the rule, there may be grounds which will justify the court in refusing it. See *The Brabo* (2) ([1949] A.C. per Lord du Parcq, at p. 350).

One of the matters to be considered by the court entertaining the application is whether the applicant has shown that he has a probable cause of action; *The Brabo* (2) per Lord Porter ([1949] A.C. at p. 340). Some care is necessary in approaching this question, as it is clearly not within the competence of the court to determine disputed issues of fact by means of affidavits. See *Société Generale de Paris v. Dreyfus Brothers* (3) ((1887), 37 Ch.D. per Lindley, L.J., at p. 225):

“Then it is said you cannot go into the merits. That is quite true. Of course, you cannot properly upon an application to serve a writ try the action. The object in giving leave to serve the writ is to put the parties in a position to try the action by-and-bye, but at the time a judge cannot perform the duty imposed upon him by this Order unless he so far look into the matter as to see whether the plaintiff has a probable cause of action or not.”

The question is discussed at some length in *The Brabo* (2) by Lord Porter who says ([1949] A.C. at p. 340):

“One may say generally that serious disputes of fact cannot as a rule be decided upon a summons, whereas question of law can, except perhaps in exceptional and complicated cases.”

In the instant case the question to be considered is whether the plaintiff has a reasonable and probable cause of action against the defendant in respect of the alleged publication to Mr. E. Lowis in Nairobi, since that is the only tort which is alleged to have been committed within the jurisdiction. Now it is admitted by Mr. Hira that there is no allegation that the defendant wrote directly to Mr. Lowis. The plaintiff's case is that the letter was originally sent by the defendant to Dr. Portschi in Vienna, as a result of an article published by Mr. Moser in an Austrian newspaper. Dr. Portschi passed the letter to Mr. Moser for his comments, and Mr. Moser in turn sent it to Mr. Lowis, because Mr. Lowis was mentioned in it. On these facts it is submitted that the publication to Mr. Lowis was a natural and probable consequence of the letter being written by the defendant to Dr. Portschi.

The question whether the publication to Mr. Lowis was a natural and probable consequence of the original publication to Dr. Portschi does not depend in any way on the production of affidavits or proof of additional facts, but is one which the court is as competent to decide at this stage as it would be at the trial. Counsel on both sides have been given and taken advantage of an opportunity to argue the matter. Both sides rely on the exposition of the law contained in *Gatley on Libel* (5th Edn.) at pp. 103-107, though each lays emphasis on different passages. For the defendant reliance is placed on para. 168 on p. 103 which states:

“One who utters a slander or writes and publishes a libel, is prima facie not liable for damage caused by its voluntary and unauthorised repetition or republication by the person to whom he published it. Such republication is not the necessary natural or probable consequence of the original publication.”

In the following paragraph three cases are set out in which the original publisher is liable. The first is where he authorised or intended the person to whom the words were published to repeat or republish them to some third party. This is not, as I understand, alleged as part of the plaintiff's case. The third is where there was a moral duty to repeat or republish the words, and again there is no suggestion that this is the case here. The only case which appears to be in any way material in these proceedings is the second, viz.:

“where the repetition or republication of the words to a third person was the natural and probable result of the original publication.”

It may be noted that in para. 171 on the next page this question is treated as a question of law.

The examples cited in para. 172 are not of any great assistance, and the court is free to determine the question in the light of the circumstances. Having considered carefully the terms of the letter I can find nothing in it which affords any ground for supposing that in the natural course of events it would be republished in Kenya.

The reason suggested by counsel for the respondent, that Mr. Lowis is mentioned in the letter, does not appear to the court to afford any ground for anticipating that Dr. Portsches as editor of the newspaper or Mr. Moser as author of the article would think it necessary to ascertain whether Mr. Lowis was the proprietor of the restaurant referred to or was in fact the author of the remark attributed to him; or that if either should take the trouble to inquire into the truth of these matters, he would find it necessary to enclose a copy of the whole lengthy letter of which complaint is made.

I can find no substance in the contention that republication in Kenya was a reasonable and probable consequence of the despatch of the letter, and that being so I do not think the plaintiff, despite his averment that he has a good cause of action, has shown that, in respect at any rate of the republication to Mr. Lowis, he has a cause of action which can properly be described as probable of success.

Finally it may be noted that in the original plaint no mention was made of Mr. Lowis by name, and the publication to Mr. Lowis, if in the mind of the plaintiff at all, was of such little moment as to be covered by a vague reference in para. 3 to “others” to whom the letter is said to have been published. It is clear that the matter of which the plaintiff substantially complains is the original publication of the libel in Austria and possibly its republication there to Mr. Moser. Neither of these acts of publication by themselves would afford any ground for service of the summons out of the jurisdiction, and it is a reasonable inference that the reference in the second plaint to publication in Kenya was made for the secondary purpose of enabling proceedings to be taken in this court. If that is so, the application for service out of the jurisdiction does not appear to me “to fall within the spirit as well as the letter of the various classes of case provided for”; see per Lord Haldane in *Johnson v. Taylor Bros.* (4) ([1920] A.C. at p. 153.

For all the above reasons I allow the objection and set aside the service on the defendant and discharge the order allowing such service. I further direct that the costs of this application be taxed and paid forthwith by the plaintiff.

Objection allowed. Service set aside and order allowing such service set aside.

For the plaintiff:

B. Sirley & Co., Nairobi

P. Le Pelley

For the defendant:

Archer & Wilcock, Nairobi

Rustam Hira

Uganda v Khimchand Kalidas Shah and Two others
[1966] 1 EA 30 (CAK)

Division:	Court of Appeal at Kampala
Date of judgment:	13 January 1966
Case Number:	180/1965
Before:	de Lestang, Spry and Law JJA
Sourced by:	LawAfrica
Appeal from:	The High Court of Uganda – Keatinge, J

[1] Criminal law – Practice – Appeal – Finding on credibility based on demeanour – Whether appellate court can reverse such finding.

[2] Evidence – Accomplice – Evidence to be believed first and then corroboration to be considered.

[3] Evidence – Receiving or retaining stolen property – Accused directors of a small private company – Stolen property found on coffee estate and house owned by the company – Whether this evidence tends to implicate the directors.

Editor's Summary

The three respondents were charged in the District Court of Mengo with receiving or retaining stolen property contra s. 298(1) of the Penal Code. The first and third respondents were directors of a company known as Khimchand K. Shah & Co., which owned a coffee estate, and all three were shareholders. The stolen property comprised of 125 bags of Arabica coffee, which, it was alleged, had been stolen while in transit from Ruanda to Kampala. In convicting the respondents the trial magistrate relied, inter alia, on the discovery on the coffee estate of three empty bags of the type in which the stolen coffee was packed, the presence in a house on the same estate of 113 1/2 bags containing Arabica coffee similar in character to that which had been stolen, and the fact that on the respondent's coffee estate only Robusta coffee was grown. On appeal, the High Court quashed the convictions and set aside the sentences, and in doing so upheld the respondents' submission that the trial magistrate had erred in his approach to the evidence of the accomplices in that he reached the decision that the witnesses were to be believed before he looked for corroboration of their evidence. The Deputy Public Prosecutor thereupon appealed to this court and contended, inter alia, that (a) the judge had erred in law in reversing the trial magistrate's finding of credibility in respect of a prosecution witness and (b) the judge had erred in holding that there was no independent evidence incriminating either the first or third respondent nor corroborating the accomplice

evidence against them and that there was no independent evidence to show that either of them took an active part in the running of the company, or frequented the factory,

Held –

- (i) the judge was not justified in reversing the trial magistrate's finding of credibility based largely on demeanour; he did not draw a different inference from the facts, as he was entitled to do, but rather substituted his own opinion for that of the trial magistrate;
- (ii) the absence or inadequacy of corroboration of the evidence of an accomplice is not of itself a reason for disbelieving that evidence but merely precludes the court (save in exceptional circumstances) from basing a conviction on it;
- (iii) the correct approach is for the court first to decide whether, in the light of all the evidence, it believes the evidence of the accomplice and then to consider whether there is corroboration of it;
- (iv) when one is dealing with a private company, evidence that stolen property was found on its premises must tend to implicate the directors in the alleged

offence of receiving or retaining; it could not in itself be enough to sustain a conviction but it was enough to corroborate accomplice evidence which had been found credible.

Appeal allowed.

Judgment

Spry JA, read the following judgment of the court: The three respondents were charged in the District Court of Mengo with receiving or retaining stolen property contrary to s. 298(1) of the Penal Code (Cap. 22) The stolen property comprised 125 bags of Arabica coffee, which had been stolen while in transit from Ruanda to Kampala. The case for the prosecution depended mainly on the evidence of one Bernard Kavuma, the person who stole the coffee; on the discovery, at the factory on a coffee estate belonging to a company known as Khimchand K. Shah Ltd. of three empty bags, alleged to be from those in which the stolen coffee was packed, and, in a house on the same estate, of 113 1/2 bags containing Arabica coffee similar in character to that which had been stolen; and on the evidence of one Karsan Ram, a man who had at the date of the alleged offence, been an employee of the company. The coffee grown on the estate was Robusta. The first and third respondents were two of the three directors, and all the respondents were shareholders, of the company. The respondents pleaded not guilty to the charge but elected to remain silent and made no defence. They were convicted and sentenced, the first respondent to a fine of Shs. 30,000/-, the second respondent to imprisonment for two years and the third respondent to imprisonment for one year. All three respondents appealed to the High Court and their appeals were successful, the convictions being quashed and the sentences set aside. It is from that decision that the present appeal is brought by the Director of Public Prosecutions.

Before dealing with the grounds of appeal, it may be convenient to dispose of a question of law which was argued both before the High Court and before us. It was argued for the respondents that the learned resident magistrate in his judgment, after directing himself correctly on the principles to be applied, erred in his approach to the evidence of accomplices in that he reached the decision that the witnesses were to be believed before he looked for corroboration of their evidence. The learned judge who heard the first appeal upheld this submission, holding that the learned magistrate had “put the cart before the horse” by first deciding that he believed the three accomplices and then looking for corroboration. With respect, we cannot agree and we think that there was nothing wrong in the learned magistrate’s approach. The absence of corroboration or the inadequacy of the corroboration of the evidence of an accomplice is not of itself a reason for disbelieving that evidence but merely precludes the court (save in exceptional circumstances) from basing a conviction on it. Of course, quite apart from any question of corroboration, a court should never accept or reject the testimony of any witness or indeed any piece of evidence until it has heard and evaluated all the evidence in the case. At the conclusion of a case, the court weighs all the evidence and decides what to accept and what to reject. When it accepts the evidence of an accomplice, it then, save as aforesaid, looks at the other evidence which it has accepted to see if it affords corroboration of the evidence of the accomplice.

The first ground of appeal was that the learned judge had erred in law in reversing the trial magistrate’s finding of credibility in respect of Karsan Ram. The difficulty regarding this witness is that his evidence was inconsistent with a statement which he was alleged to have made to a police officer, Assistant Superintendent Mascarenhas. The discrepancies are too numerous and too important to be dismissed as the result of mistake or misunderstanding. Karsan

Ram denied categorically that he had said many of the things attributed to him; he said they were inventions of the recording officer. Assistant Superintendent of Police Mascarenhas, on the other hand, swore that he had recorded the witness' statement to the best of his ability and had read it back and had it confirmed. It is not clear from the record whether or not Karsan Ram was under arrest at this time.

In weighing this conflicting evidence, the learned magistrate had also to consider another allegation against Assistant Superintendent of Police Mascarenhas. This was made by one Yowana Kabyemera, the driver of the lorry in which the stolen coffee was transported. He made four statements to the police. The first was to Assistant Superintendent of Police Mascarenhas and was made on August 21, 1964. In it, he is recorded as saying that the stolen coffee was taken to Kawempe, four or five miles from Kampala. (The factory belonging to Khimchand K. Shah & Co. is at Busikiri, about twenty miles from Kampala).

The learned magistrate thus found himself in the difficult position of having to choose between the evidence, on the one hand, of Assistant Superintendent of Police Mascarenhas, whom he described as an officer "with unblemished character", and on the other Kabyemera, whom he described as "a self-confessed liar" and Karsan Ram, whom he described as "connected in some way with the accused persons in their business"; all three being witnesses for the prosecution. He was obviously reluctant to go any further into the conduct of Assistant Superintendent of Police Mascarenhas than was essential to the just determination of the case before him but he did hold, after directing himself most carefully, that Karsan Ram was a witness of truth, whose evidence was to be preferred, where there was conflict, to that of Assistant Superintendent of Police Mascarenhas.

The learned judge dealt with this in the following passage from his judgment:

"The learned magistrate did not specifically say that he did not accept the police officer's evidence but by accepting Karsan Ram's testimony he branded this officer as being a blatant liar and a person quite unworthy of his office. The learned magistrate had the advantage of studying the demeanour of this witness while giving his evidence but he has given no reasons for branding Mascarenhas as a rogue. Having fully considered the evidence of Karsan Ram and his statement, I have not the same confidence in him as the learned magistrate. In my judgment it would be unsafe to rely on his evidence."

Counsel for the appellant, submitted that while a first appeal is of the nature of a retrial, a decision on credibility based partly on demeanour cannot be reversed unless it is perverse. Counsel, for the respondents, argued, on the contrary, that on a second appeal, this court could only interfere with the finding of the learned judge if it were such that no court could reasonably have arrived at it, and he contended that not only was such not the case, but that the learned judge was in fact correct. He submitted that the learned magistrate had to find beyond reasonable doubt that Assistant Superintendent of Police Mascarenhas was a rogue, since that had become part of the case against the respondents and an indispensable part of the case against the second respondent.

We think, with respect, that that is putting the standard too high. It was perhaps unfortunate that the prosecution considered it necessary to call Assistant Superintendent of Police Mascarenhas, as opposed to making him available, but the evidence he gave which had the effect of supporting the respondents' case was given in cross-examination and was not part of the case for the prosecution. The only evidence he gave which can be regarded as of any importance to the prosecution concerned the taking of samples of coffee and this was not challenged. The effect of finding him untruthful, and there was clearly such a

finding, did no more, for the purposes of this case, than to discredit him as a witness. The learned magistrate applied his mind to the standing of this officer and it was only after contrasting that standing with that of Kabyemera, the “self-confessed liar” and that of Karsan Ram, the “very simple man” who was at times “vague and evasive”, that he arrived at the conclusion that of the three, only Karsan Ram could be regarded as essentially truthful.

Counsel for the respondents submitted also that the fact that Karsan Ram signed what has been described as a receipt on August 7, 1964, for 112 bags of Arabica coffee, was confirmatory of his statement and cast further doubt on his evidence. He referred to this receipt as having been overlooked by the learned magistrate, but this is not strictly correct, as the significance of the receipt was considered by the learned magistrate, although in a different part of his judgment, when he concluded that it was not necessarily inconsistent with the prosecution case. The learned judge referred to this receipt, although he certainly did not expressly make it a ground for disagreeing with the trial magistrate. Counsel for the respondents argued that, if Karsan Ram’s evidence was true, this receipt could only be regarded as a false document and this necessarily discredited him as a witness. The significance of the receipt is far from clear, and we think the learned magistrate was justified in his view that it was not necessarily inconsistent with the prosecution case.

On this ground of appeal, we think that the learned judge was not justified in reversing the finding of the learned magistrate. The finding was essentially one of credibility, based largely on demeanour. The learned judge has not, we think, drawn a different inference from the facts, as he was entitled to do, but has rather substituted his own opinion for that of the trial magistrate, because of the doubt he felt as to the reliability of Karsan Ram. We think this ground of appeal must succeed.

The second and third grounds of appeal were that the learned judge had erred in holding that there was no independent evidence incriminating either the first or third respondent, corroborating the accomplice evidence against them. The facts relied on by the prosecution were the finding of the three empty bags in the factory, the finding of the 113 1/2 bags of Arabica coffee on the Busikiri Estate, where only Robusta was grown, and the expert evidence that the coffee so found was similar in quality to the stolen coffee.

The learned magistrate held that these facts were capable of amounting to corroboration. He said further:

“These bags were found in the premises of a factory belonging to a limited company. Not all the shareholders were charged with the offence of receiving because there was no evidence connecting them with the stolen bags or with knowledge that the bags were stolen but there was evidence connecting A1, A2 and A3, A1 and A3 are not merely shareholders, but directors, and the question is not whether they were there physically when the load was discharged but whether they bought the property knowing or having reason to believe it was stolen and that the property was there with their knowledge and sanction, and over which they exercised control.”

Before the first appellate court, the argument appears to have developed as to whether the bags and the coffee could be said to have been in the possession of the first and third respondents, and the learned judge held that this had not been proved. He found that there was no independent evidence to show that either of them took an active part in the running of the company, or frequented the factory, and he observed that they lived twenty miles away from it. He held that:

“The mere fact that a man is a director and shareholder of a company on

whose premises stolen property is found, in my opinion, cannot in the absence of any other evidence, make him a possessor of the stolen property.”

From that, he concluded that there was no independent evidence tending to incriminate either the first or third respondent.

Before this court, counsel for the appellant accepted the blame for the argument in the lower court having taken what, he submitted, was the wrong course. He did not seek to show that the coffee had been in the constructive possession of the first and third respondents: all that he sought to argue was that the evidence that Arabica coffee, of a type similar to that stolen and approximately corresponding in quantity, and bags which had been among those containing the stolen coffee, were found on property of a company of which the first and third respondents were directors, was, to put it at its lowest, evidence “tending” to implicate those respondents.

Counsel for the respondents argued that when stolen property is found on the premises of a limited company, actual control by the individual charged had to be proved. It might be that the first respondent, as father of the family, was in control of the company but there was no evidence to that effect and a finding to that effect would be no more than speculation.

We think there is merit in counsel for the appellant’s argument. Evidence to be corroborative must be independent and it must implicate, or tend to implicate, the individual accused in the offence. This is a matter of fact in each case. It seems to us that when one is dealing with a small private company, a family company, evidence that stolen property was found on its premises must tend to implicate the directors in the alleged offence of receiving or retaining. It could not, of course, in itself be enough to sustain a conviction but we think it is enough to corroborate accomplice evidence which has been found credible. The position might be quite different in the case of a large, public corporation. We would, therefore, allow the appeal on the second and third grounds.

Counsel for the respondents submitted that if we were to allow the appeal, it would not be proper to restore the convictions and sentences passed by the learned magistrate, because the appellate judge, having found reason to allow the appeals on the grounds with which we have dealt did not consider it necessary to consider various other issues which had been raised on the first appeal. We are satisfied that there were other matters raised in the three petitions of appeal and argued at the hearing of the first appeal and we do not consider that it would be proper for us to consider their merits without having the advantage of the opinions of the learned judge who heard the appeal, particularly since these matters were not, and, indeed, could not have been argued before us.

We accordingly allow this appeal and set aside the judgment of the High Court. The proceedings are remitted to the High Court for its decision on those grounds of appeal raised in the petitions of appeal to the High Court which are not disposed of by this judgment.

Appeal allowed.

For the appellant:

The Attorney-General, Uganda

A. G. Deobhakta (State Attorney, Uganda)

For the respondents:

Parekhji & Co. and Ponda, Asaria & Co., Kampala

**Mohamed Thabet Ali Maktari v Mohamed Rageh Mohamed Saleh Maktari
and others**

[1966] 1 EA 35 (CAN)

Division: Court of Appeal at Nairobi
Date of judgment: 25 February 1966
Case Number: 2/1966
Before: De Lestang Ag VP Duffus and Law JJA
Sourced by: LawAfrica
Appeal from The Supreme Court of Aden – Light, Ag. J.

[1] Mohammedan law – Will – Document written and signed by a Kadi and witnessed but not signed by two witnesses – Whether bequest made by testatrix – Question of proof.

Editor's Summary

The appellant had filed a suit for partition of a number of properties in which he claimed an interest by virtue of a bequest under a will purporting to be made by his grandmother. The will purported to be written and signed by a teacher or Kadi called Syed and witnessed but not signed by two witnesses. At the trial, one of the witnesses (but not the writer) was called to give evidence. The trial judge was not prepared to believe the evidence of the appellant and his witness and held that the bequest had not been proved. The appellant appealed on the ground that this finding was against the weight of the evidence and it was further submitted that since the two daughters of the testatrix had not contested the bequest it should be held to be valid against them.

Held –

- (i) where an alleged will is neither written nor signed by the maker and its validity depends solely on oral evidence the court will treat such evidence with caution and only act on it if it is reliable;
- (ii) the trial judge was not satisfied with the oral evidence and the court was not prepared to say that in all the circumstances he had erred in his conclusion;
- (iii) the court having found that the bequest was not proved there was no valid bequest for which the court could pronounce.

Appeal dismissed.

The following judgments were read.

Judgment

Sir Clement De Lestang Ag VP: This is an appeal from the decision of the Supreme Court of Aden dismissing the appellant's suit for partition of a number of properties in which he claimed an interest by virtue of a bequest under a will purported to be made by his grandmother, Kabool, in the Yemen. It would appear that under Mohammedan Law, which applies, a will may be either oral or written. If oral it must probably be made in the presence of two male adult Moslem witnesses. If written, the writing need not be in any special form and need not be signed or attested. In these circumstances it is not surprising that "inherent suspicion", as Mr. Nowrojee conceded, attaches to such wills, the result being that a heavy burden must rest on a party who propounds it. The alleged will in the present case is a document which purports to be written and signed by a teacher or kadi called Syed Abdul Asizi and witnessed but not signed by two witnesses, one being Abdo bin Thabet. The document relates that Kabool appeared before the writer and bequeathed one-third of her inheritance from her deceased son Rageh, to her grandson, the appellant. Thus the document on its face constituted a valid will in Mohammedan Law and the

preliminary question which the Court had to decide was whether Kabool had, in fact, made the bequest contained in it. Kabool left a son and two daughters and it was the son only who contested the bequest. The learned judge in the court below held that the alleged bequest had not been proved and the appellant appeals on the ground that this finding is against the weight of evidence.

The only evidence in support of the genuineness of the bequest is that of Abdo bin Thabet which is to the effect that he was present when Kabool made the bequest and Syed Abdo Asizi wrote it down. He identified the document and the signature of Syed. He also said that two months later Kabool handed it over to him and he brought it to the appellant in Aden. The appellant confirmed that he received the will in Aden from Abdo bin Thabet, though at a much later date. He said that he informed Kabool's son about it but he would not accept it and he gave the will to his lawyer for the purpose of informing the other heirs, all this in the lifetime of Kabool. There is no evidence that the lawyer did inform the heirs.

Against that there is the evidence of Kabool's son who testified that his mother never informed him of the bequest to the appellant and that although he lived near the appellant and saw him often the appellant never told him of the bequest during his mother's lifetime. It was only seven months after his mother's death that the appellant mentioned that he had received a gift from Kabool but gave no details, saying that he would know about it in court. In these circumstances although there was evidence which, if believed, would support a finding that the bequest was duly made, the learned judge was not prepared to accept the evidence of Thabet and the appellant, having regard to certain discrepancies between their evidence and between the appellant's evidence and that of Kabool's son which he believed. One such discrepancy, to which I have already referred, relates to the date the will was delivered to the appellant. Thabet said it was two months after it was executed which would make it June or July, 1960, while the appellant said it was on 10th January, 1961. It may well be, as Mr. Nowrojee has submitted, that it was Thabet and not the appellant who was in error. In that case Thabet would not be a reliable witness and yet the appellant's whole case rests on him. The learned judge was also unfavourably influenced by the failure of the appellant to call the writer of the document who was available at only a day's journey from Aden and clearly ought to have been called.

In a case of this nature where an alleged will is neither written nor signed by the maker and its validity depends solely on oral evidence, the court will treat such evidence with caution and only act on it if it is reliable. In the present case the learned trial judge was not satisfied with the oral evidence and I am not prepared to say that in all the circumstances he erred in his conclusion. Quite apart from the unreliability of the oral evidence itself, there are certain odd and unexplained features in this case. The will purports to be made on Showal 1379 Higriyah which corresponds to March or April, 1960, of the Christian calendar, and although it refers several times to "her deceased son" or similar expressions the son was then very much alive; he died a year later on March 17, 1961. Again, although the appellant said that he received the will on January 10, 1961, it was not presented for certification by the Government Agent in Yemen until the day following Kabool's death.

It was also contended by counsel for the appellant that in Mohammedan Law a bequest to an heir is not valid unless the other heirs assent to the bequest after the death of the testator but that a single heir may consent so as to bind his own share. By analogy he submitted that since Kabool's two daughters, one of whom is the mother of the appellant, did not contest the bequest it should be held to be valid against them. I am unable to agree. The court, having found that the bequest was not proved, there is no valid bequest for which the court can

pronounce. I would accordingly dismiss the appeal with costs and as my brothers agree it is so ordered.

Duffus JA: I agree.

Law JA: I also agree.

Appeal dismissed.

For the appellant:

E. P. Nowrojee and H. M. Handa, Aden

For respondents 1, 3-15 and 17:

Ashraf Khan and W. H. Ansari, Aden

The respondents 2, 16, 18 and 19 did not appear and were not represented.

Gian Singh v Amar Kaur
[1966] 1 EA 37 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	9 March 1966
Case Number:	46/1965
Before:	Harris J
Sourced by:	LawAfrica

[1] Rent restriction – Standard rent not exceeding seventy shillings per month – Claim for possession by landlord – Consent order before administrative officer – Order for vacant possession and other reliefs – Whether administrative officer has power under the Rent Restriction Act to make an order for vacant possession.

[2] Judgment – Order – Consent order – No jurisdiction to set aside without further suit.

Editor's Summary

The respondent claimed under the provisions of the Rent Restriction Act (Cap. 296) possession of the suit premises occupied by the appellant together with other reliefs and in the proceedings before the administrative officer a consent order was recorded providing inter alia that the appellant should vacate the premises on or before September 20, 1965. It was common ground that the standard rent of the premises did not exceed Shs. 70/- per month and that there had been delegated to the administrative officer under s. 5(2)(a) of the Rent Restriction Act power to exercise the statutory jurisdiction in respect of the premises under the Act. The appellant having changed his advocates, later applied in the magistrate's court to have that order set aside and the case restored to the hearing list. The learned

magistrate dismissed the application as incompetent, saying that a judgment by consent can be set aside only in a suit instituted for that purpose. The appellant appealed against that decision and it was contended that the administrative officer had no power under the Rent Restriction Act, even with the consent of the parties, to make an order for vacant possession because of the restrictions imposed by s. 15 of the Act upon the power to make orders for possession. It was further contended that under s. 5(1)(m) of the Act the magistrate has power to re-open any proceedings in which the administrative officer has given a decision.

Held –

- (i) the restriction imposed by s. 15(1) of the Rent Restriction Act had no application as the appellant was in arrear with his rent;
- (ii) the power conferred upon the magistrate's court under s. 5(1)(m) *ibid.* restricts the re-opening of proceedings in which that court has itself given a decision but not proceedings in which the administrative officer alone has given a decision;
- (iii) the correct method of applying to set aside or vary an order of the administrative officer is by way of an application in the resident magistrate's court for review under s. 8(3) of the Act;

- (iv) as the order of the administrative officer was by consent it could not be set aside otherwise than in a suit instituted for that purpose.

Appeal dismissed.

Judgment

Harris J: This is an appeal from a decision of the Senior Resident Magistrate (Civil) at Nairobi whereby he dismissed a motion on notice brought by the appellant seeking to have set aside an order for possession made by the administrative officer appointed under the provisions of the Rent Restriction Act (Cap. 296).

In the proceedings before the administrative officer the present respondent claimed as plaintiff possession of the suit premises, being the portion of L.R. 209/2489/49, Desai Road, Nairobi, occupied by the appellant, together with other relief. Each party was there represented by counsel and at the conclusion of the evidence of the plaintiff's husband, who was called on behalf of the plaintiff, a consent order dated July 20, 1965, was recorded providing that the appellant should vacate the premises on or before September 30, 1965; pay to the plaintiff certain moneys by way of mesne profits, share of water and electricity charges and costs; keep the peace; and commit no nuisance or annoyance.

The appellant, having changed his advocates, later applied in the magistrate's court to have that order set aside and the case restored to the hearing list. This proceeding was expressed to be brought under the provisions of ss. 34 and 97 of the Civil Procedure Act and O. L. r. 1, of the Civil Procedure (Revised) Rules, 1948, and all amendments thereto. At the hearing counsel for the appellant, relied also upon s. 26 of the Civil Procedure Act and contended that the advocate who had represented the appellant before the administrative officer had exceeded his authority in consenting to the order. The learned magistrate dismissed the motion as incompetent, saying that a judgment by consent can be set aside only in a suit instituted for that purpose. The appellant did not at that stage rely expressly upon the provisions of the Rent Restriction Act nor did the learned magistrate find it necessary to refer to them, and from that decision of the magistrate this appeal is brought.

In this court, the same counsel, who again appeared for the appellant, contended that the administrative officer had no power under the Rent Restriction Act, even with the consent of the parties, to make an order for vacant possession; that the appellant and his former advocate had been mistaken in thinking that such a power existed; and that, since consent alone cannot confer jurisdiction, the order of the administrative officer was ultra vires. Mr. Pall on behalf of the respondent submitted that the issue in this Court should be confined to the sole question as to whether the learned magistrate was correct in dismissing the appellant's motion and that none of the provisions of the Act or the Rules relied upon by the appellant afforded a ground for interfering with the order of the administrative officer. In view, however, of the fact that orders of this nature are frequently made by the administrative officer and that it is desirable that the nature and extent of his jurisdiction in the matter should not be in doubt, I reserved my decision in order to consider the position generally and on the broader basis suggested by the appellant.

It is admitted that the standard rent of the premises does not exceed Shs. 70/-per month and that there had been delegated to the administrative officer under s. 5(2)(a) of the Rent Restriction Act power to exercise the statutory jurisdiction in respect of premises under the Act, but it was argued for the appellant

that by virtue of the restrictions imposed by s. 15 upon the power to make orders for possession of such premises the jurisdiction of the administrative officer to make such an order, even by consent, had been withheld.

Section 5(2)(a) provides that in respect of premises whereof there is no standard rent or whereof the standard rent does not exceed Shs. 70/- per month “the court”, that is, a subordinate court held by a Senior Resident Magistrate or Resident Magistrate, may, from time to time and subject to certain limitations which are not material, delegate all or any of its powers under the Act to an administrative officer or any other person. The relevant instrument of delegation in the present case is in the following terms:

“In the Resident Magistrate’s Court at Nairobi. Rent Restriction Ordinance 1959.

In exercise of the powers conferred upon this court by sub-s. 2 of s. 5 of the Rent Restriction Ordinance 1959 I hereby delegate to William Edward Collett all the powers of the court under the said Ordinance subject to the limitations and conditions specified in the said sub-section. Dated this 30th day of November 1959.

Sgd. H. G. Sherrin.

Senior Resident Magistrate.”

In addition to this general delegation of powers the present case was specifically delegated to the administrative officer by the learned magistrate by an order made on May 20, 1965, the parties by their respective counsel so consenting.

The first question therefore is as to whether this delegation of powers to the administrative officer enables him to make orders for possession under s. 5(1)(f), controlled, as it is, by s. 15(1). For the appellant it was argued that the powers so delegated did not include any powers under s. 15. The weakness in this contention is that the only portion of s. 15 with which we are concerned is sub-s. (1) and that that sub-section does not purport to confer any powers upon anybody and merely imposes a restriction upon the exercise of the power to grant possession to be found elsewhere in the Act. The delegation of power to which I have referred contained no reference to s. 15(1), nor need it have done so, for the sub-section extends automatically to the exercise by the administrative officer of the powers so delegated to him. The restriction imposed by s. 15(1) has no application here in view of the appellant being in arrear with his rent, and this ground of appeal fails.

The appellant also relied upon the fact that s. 5(2)(c) of the Rent Restriction Act preserved to the resident magistrate’s court full jurisdiction to exercise any of the powers which may have been already delegated by it to an administrative officer and contended that the learned magistrate from whose decision this appeal is taken had therefore full jurisdiction to hear and determine the appellant’s motion and should have done so. It is not necessary for me to decide whether in this instance the learned magistrate would have had jurisdiction under this reserved power to entertain the appellant’s motion had it been brought under the provisions of the Act, for it is quite clear that the motion was not so brought and that the Act was at no time referred to at the hearing before the magistrate. The argument based on this contention has no merit and also fails.

In addition the appellant sought to rely on the provisions of s. 5(1)(m) of the Rent Restriction Act as enabling the magistrate’s court to re-open any proceedings in which the administrative officer has given a decision. In my opinion this submission is based upon a mis-reading of the section, for the power there conferred upon the magistrate’s court is to re-open proceedings in which that court has itself given a decision but not proceedings in which the administrative officer alone has given a decision. The correct method of applying to set aside or vary an order of the administrative officer is by way of an application in the resident magistrate’s court for review under s. 8(3), but this course was not adopted in the present instance.

A further and major defect in the appellant's case is that the order of the administrative officer was itself a consent order, made in the presence of counsel for each of the parties, and in general it is not open to a party to such an order to seek to have it set aside otherwise than in a suit instituted for that purpose. That course has not been followed here and, even if it had been, it would seem to have had little chance of succeeding.

For these reasons I do not find it necessary to deal with the additional matters put forward by Mr. Pall in his careful argument and the appeal is dismissed with costs on the higher scale.

Appeal dismissed.

For the appellant:

B. D. Bhatt, Nairobi

For the respondent:

G. S. Pall, Nairobi

H McGovern v Maize Marketing Board [1966] 1 EA 40 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	25 March 1966
Case Number:	1149/1965
Before:	Harris J
Sourced by:	LawAfrica

[1] Master and Servant – Contract of service – Termination of employment – Contract for minimum period of three months and thereafter for further period of up to three months – Latter period subject to one month's notice on either side – Notice of termination of service by employer given after two months of service – Whether notice of termination of service valid.

[2] Contract – Service agreement in writing – Construction of ambiguity against person responsible.

Editor's Summary

The defendant agreed to employ the plaintiff from March 1, 1965, for a minimum period of three months, and thereafter for a further period of up to three months, the latter subject to one month's notice on either side. By a letter dated April 30, 1965, the defendant purported to terminate the plaintiff's employment on May 31, 1965, and the plaintiff filed a suit alleging that this constituted a breach of the contract and claimed damages. No parole evidence was given at the hearing and it was agreed that the sole issue for the court to decide was whether the defendant was entitled to terminate the plaintiff's employment as it

purported to do. For the plaintiff it was contended that notice to terminate could not have been given until the completion of the initial three months of employment at the end of May, 1965.

Held – the defendant was not empowered to terminate the employment on May 31, and accordingly the notice of termination of service was invalid.

Judgment for the plaintiff.

Cases referred to in judgment:

- (1) *Brown v. Symons* (1860), 8 C.B. N.S. 208.
- (2) *Costigan v. Gray Bovier Engines Ltd.* (1925), 41 T.L.R. 372.
- (3) *Langton v. Carleton* (1873), 9 Ex. 57.
- (4) *Re an Indenture etc. Marshall & Sons Ltd. v. Brinsmead & Sons Ltd.* (1912), 106 L.T. 460.
- (5) *Jacks & Co. v. Palmers Shipbuilding & Iron Co.* (1928), 98 L.J. K.B. 366.

Judgment

Harris J: By a letter dated February 19, 1965, the general manager of the defendant board wrote to the plaintiff, who was already in the employment of the defendant, in the following terms:

“With reference to your interview with me, in the presence of the Deputy General Manager, the Secretary/Chief Accountant and the Establishment Officer, on Tuesday, the 16th instant, I hereby offer you further employment in your present post and capacity, as from March 1, 1965, i.e. after the expiry of your present Service Agreement on February 28, 1965, for a minimum period of 3 months, and thereafter for a further period of up to 3 months, the later subject to one month’s notice on either side.”

The letter continued by setting out particulars of the emoluments and benefits to which the plaintiff would become entitled in the event of his accepting the offer, and concluded with a request that he should send in a formal written acceptance of the offer. This the plaintiff did by a letter dated February 22 addressed to the defendant.

By a subsequent letter dated April 30, 1965, the defendant purported to terminate the plaintiff’s employment on May 31, 1965. In the present action the plaintiff alleges that this constituted a breach of the contract contained in the correspondence and for this breach he claims damages. No parol evidence was given at the hearing and it was agreed that the sole issue upon which the decision of the court is required is the question as to whether the defendant was entitled so to terminate the plaintiff’s employment.

For the plaintiff it was contended that notice to terminate could not have been properly given until the completion of the initial three months of employment at the end of May and that accordingly he was entitled, in effect, to be employed under his contract for at least four months in all, with the result that the notice should have been expressed to expire, at the earliest, on June 30. For the defendant it was argued that this construction would deprive the word “minimum”, as used in the agreement, of its due weight and that the defendant was entitled to terminate the entire contract with effect from the end of the first three months.

Thanks to the industry of counsel I was referred to a number of decisions bearing upon the matter in which the facts were to some extent similar to those before me and with which decisions I shall now deal. It is, of course, clear that since the agreement was entered into after December 31, 1960, it falls to be construed, to the extent indicated in the Law of Contract Act (Cap. 23), in accordance with the common law of England as it was on January 1, 1961, subject to any qualifications or modifications arising subsequently under the constitutional or general law of this country.

In *Brown v. Symons* (1), the Court of Common Pleas in England (Keating, J., dubitante) held that a contract of service which was to be binding between the parties “for twelve months certain from the date hereof, and continue from time to time until three months’ notice in writing be given by either party to determine the same” could be determined at the end of the initial twelve months upon three months’ notice in writing previously given. This decision was referred to with approval by the Court of Appeal in England in *Costigan v. Gray Bovier Engines Ltd.* (2), where a service contract which was to continue for a period of twelve months from a date already passed “and thereafter until determined by three calendar months’ notice in writing given by either party at any time to the other” was held to be capable of determination at the end of the twelve months by three calendar months’ notice given during that period. In this case Pollock, M.R., said that the difficulty in accepting a construction such as it suggested by the

plaintiff here arose from the presence in the contract of the words “at any time” in regard to the giving of notice. These words do not appear in the agreement with which the present case is concerned.

The Court of Exchequer (Kelly, C.B., dissentiente) in *Langton v. Carleton* (3) gave a similar construction to a contract for service which provided that the agreement should be for twelve months certain, after which time either party should be at liberty to terminate the agreement by giving to the other a three months' notice in writing of his desire so to do. The court there took the view that, by reason of the use of the word "certain", the contract would have expired at the end of the first twelve months without any notice at all and that the necessity for a notice would have arisen only in the event of the parties having prolonged the engagement beyond those twelve months.

A case in which neither the word "certain" nor the term "at any time" appeared in the contract is that of *Re an Indenture etc. Sir Herbert Marshall & Sons Ltd. v. John Brinsmead & Sons Ltd.* (4). There by a contract of agency made in the year 1905 the plaintiff, as successor to a partnership firm, became the agent of the defendant for the sale of certain musical instruments. The report does not purport to give the exact words of the contract but one of its terms was to the effect that it should operate until December 31, 1911, and should continue thereafter subject to determination by twelve months' previous notice in writing by either side. The defendant having in November, 1910 given notice in writing of its intention to terminate the agency on December 31, 1911, the plaintiff, by arrangement, took out an originating summons for the purpose of obtaining the decision of the court as to the validity of the notice. The defendant relied on *Brown v. Symons* (1) but Eve, J., dealt with the matter by saying:

"The question to be decided is whether the twelve months' notice determining the agreement of May 15, 1905, on December 31, 1911, is good and valid; in other words, whether the power under the agreement to give notice applies to the fixed period terminating on December 31, 1911, or to the other period continuing thereafter, and which is an uncertain period. I think the agreement does not permit either party to determine it except by giving notice after the fixed period – that is, after December 31, 1911. Then it is competent for either party to limit the time of the agency, but no notice can be given until after that date."

The most recent case to which I was referred is that of the Court of Appeal in England in *Jacks & Co. v. Palmers Shipbuilding and Iron Co.* (5), decided in 1928, in which it was held, following *Costigan v. Gray Bovier Engines Ltd.* (2) and distinguishing *Langton v. Carleton* (3), that an agency agreement expressed to be for a period of twelve months from a certain date "with six months' notice thereafter on either side to terminate" could not, having regard to the use of the word "thereafter", be terminated by a notice given before the twelve months had elapsed.

Each of the above five decisions is referred to with apparent approval in one or more of the several works of authority upon the current law of contract and, although there runs through most of them the inveterate principle that in the last resort each case must depend upon its own facts they are nevertheless of assistance in considering and evaluating the relevant characteristics of the agreement in the present case.

One of the principal features of that agreement is that it would appear to contemplate two successive periods of employment, the first to run for a minimum period of three months commencing on March 1, 1965. In none of the cases mentioned is there a reference to a "minimum" period and the plaintiff invited me to say that the implications of this word are distinguishable from those attaching to the word "certain" as used in both *Brown v. Symons* (1) and *Langton v. Carleton* (3). In this I think he is correct, for while a term certain admits, strictly speaking, neither of enlargement nor abbreviation the description of a period as a minimum period suggests the possibility of its being extended and, in the

present contract, tends to emphasise the distinction to be drawn between the first or minimum period and the second period, which is imported by the words “and thereafter for a further period of up to three months”; and which is therefore in terms a maximum period.

The weakness in the defendant’s argument that the effect of the word “minimum” would be lost if the plaintiff’s contention were to succeed is that it overlooks the fact that the word is used as descriptive of the first period alone and not of either the second period which the agreement envisages or the aggregate of the two periods. Furthermore the second period was in any event to commence immediately after the expiration of the first period whether such expiration occurred after exactly three months, that is, on May 31, or at a later date and, as the first period was not, in fact, extended, the date for commencement of the second period was immediately after midnight on May 31, that is to say, on June 1. The notice given by the defendant purporting to terminate the employment on May 31 with the expiration of the first period would therefore, if valid, have the effect of preventing the second period from ever commencing to run, and this does not appear to be within the contemplation of the agreement.

It is possible that the agreement would have permitted the defendant to give notice during the currency of the initial three months provided that the notice was expressed to terminate the employment at a date not less than one month after the end of that period, that is, not earlier than June 30. However that may be, my opinion is that, for the reasons which I have endeavoured to state, the language used in the contract in this case is sufficiently similar in its essentials to that to be found in *Marshall v. Brinsmead* (4) and *Jacks & Co. v. Palmers Shipbuilding and Iron Co.* (5) to lead me to hold that the defendant was not empowered to terminate the employment on May 31, and that the plaintiff’s claim should succeed.

Apart from the considerations to which I have referred the plaintiff is entitled to rely upon the fact that the words giving rise to the question at issue are derived from the defendant’s letter of February 19, 1965, and upon the principle that, as it has been aptly expressed, it is a natural and intelligible canon of linguistic construction to read an ambiguity against the person responsible for it, a principle applicable, where appropriate, to cases in contract.

I understand that the amount of the damages has been agreed and there will therefore be judgment for the plaintiff in that sum, with costs.

Judgment for the plaintiff.

For the appellant:

Hosang Shroff, Nairobi

For the defendant:

Kaplan & Stratton, Nairobi

J. A. Couldrey

Edgar Bernard Clifton v Arther John Hawley
[1966] 1 EA 44 (HCK)

Division: High Court of Kenya at Nairobi

Date of judgment: 30 July 1965

Case Number: 519/1964

Before: Harris J

Sourced by: LawAfrica

[1] False imprisonment – Arrest on a warrant bearing another name – Whether consent a defence – Damages general and special considered.

[2] Estoppel – Estoppel by conduct – Action for false imprisonment – Whether plaintiff estopped by submitting to arrest on a warrant in another name.

[3] Police – Arrest with warrant in another name – Protection under Police Act (Cap. 84), s. 30(1) and s. 31 (K.).

[4] Customs – Arrest with warrant in another name – Protection under East African Customs Management Act, 1952, s. 5.

Editor's Summary

The defendant bona fide purported to execute a duly endorsed warrant of arrest for Edward Bernard Clifton by apprehending the plaintiff and bringing him before a magistrate in Nairobi to answer charges laid under the East African Customs Management Act, 1952 (referred to as “the Customs Act”). By mischance the plaintiff failed to observe that he was not named in the warrant and submitted to the arrest. On the plaintiff giving evidence of his name before the magistrate, he was immediately released at the instance of counsel representing the defendant's employer, though without express apology. Subsequently the plaintiff was acquitted of these particular charges and sued the defendant for damages for false imprisonment. The defendant conceded that technically arrest and imprisonment had occurred but contended that he was protected by the joint effect of s. 5 of the Customs Act and s. 30(1) and s. 31 of the Police Act (Cap. 84); that the error in the warrant was de minimis; that having apparently taken the opportunity to see that the warrant applied to him the doctrine volenti non fit injuria applied to the plaintiff: that the plaintiff was estopped from denying his implied representation that the warrant referred to him and that the plaintiff was only entitled to nominal general damages and such sum by way of special damages as might be reasonable. The plaintiff argued that consent was no defence in an action for false imprisonment; that, in relation to estoppel, there was no duty on the plaintiff to disclose errors in the warrant, that the defendant relied on no representation of the plaintiff and that the defendant's position had not been altered; that nominal damages could only be awarded in exceptional circumstances and that no loss need be proved to support an award of substantial general damages.

Held –

- (i) the extension of the protection of the Police Act, s. 31, to Customs officers only applies to acts done or purporting to have been done under the Police Act and here the defendant was acting under the Customs Act;
- (ii) an arrest under an invalid warrant, as opposed to an arrest like in this case of a person not named, would be protected by the Police Act, s. 30(1), and further, where the liberty of the subject was involved, the Police Act s. 30(1), would not be extended nor would the de minimis rule be applied

to this misnomer;

- (iii) to set up the defence of *volenti non fit injuria*, which could be raised in an action for false imprisonment, the defendant had to show that the plaintiff's express or implied assent was given with knowledge of the facts and this had not been done;

- (iv) the plaintiff's conduct amounted to a representation that the warrant entitled the defendant to arrest and detain the plaintiff; the defendant by relying on that representation changed his position and the estoppel succeeded even though the plaintiff may not have had full knowledge of the facts; *Cairncross v. Larimer* (1860), 3 L.R. 130 applied.
 - (v) general and special damages considered in the event of a successful appeal.
- Action dismissed.

Cases referred to in judgment:

- (1) *Chapman v. Ellesmere* (Lord), [1932] 2 K.B. 431.
- (2) *Cairncross v. Lorimer* (1860), 3 L.T. 130.
- (3) *Houghton v. Nothard, Lowe & Wills, Ltd.*, [1928] A.C. 1; (1927), 44 T.L.R. 76.
- (4) *Sarat Chunder Dey v. Gopal Chunder Lala* (1892), L.R. 19 I.A. 203.
- (5) *In re Eaves, Eaves v. Eaves*, [1940] Ch. 109; [1939] 4 All E.R. 260.
- (6) *Re William Porter & Co., Ltd.*, [1937] 2 All E.R. 361.

Judgment

Harris J: This is an action for damages for false imprisonment arising out of a somewhat unusual set of circumstances. By a warrant of arrest dated December 21, 1963, and signed by a resident magistrate in the District Court at Dar-es-Salaam in Criminal Case No. 3584 of 1963 (of Tanganyika) the defendant, who was then the acting senior investigation officer of the East African Customs and Excise at Dar-es-Salaam and is now senior investigation officer of the same organisation at Nairobi, was directed to apprehend a person described in the warrant as "Edward Bernard Clifton" and to produce him to the magistrate to answer a charge laid under sections 149(e) and 154 of the East African Customs Management Act, 1952, to which I shall refer as the Customs Act. The defendant caused this warrant to be duly endorsed by a resident magistrate of the first class in Nairobi on January 7, 1964, and on the following day, accompanied by and acting under the directions of a Mr. Upshon, the senior investigation officer of the East African Customs and Excise at Nairobi, who was in charge of the case, he proceeded to execute it by arresting the plaintiff at about 10 o'clock in the morning at the latter's place of business in Kenyatta Avenue, Nairobi.

At this time the defendant did not know the plaintiff by sight but the latter was pointed out to him by Mr. Upshon. According to the plaintiff, when Mr. Upshon entered the office he pointed to the plaintiff and said to the defendant, "That is the man", whereupon the defendant came over to the plaintiff's desk and said, "Are you Mr. Clifton", to which the plaintiff replied in the affirmative. The defendant then said that he was a customs investigation officer from Dar-es-Salaam and had a warrant for the plaintiff's arrest. As he was saying this he placed his identification card, with his photograph on it, together with the warrant, on the desk in front of the plaintiff, who glanced at the warrant without picking it up, the writing being towards him, saw the name "Clifton" on it, and concluded that it referred to him. The defendant's recollection of the matter did not seriously conflict with that of the plaintiff but he said that he believes he read out to the plaintiff all the typed portion of the warrant, including the name of the person to be

arrested, and that the plaintiff took the warrant into his own hands and appeared to read it also.

By a curious mischance, however, the plaintiff failed to observe that the name on the warrant of the person to be arrested was given as “Edward Bernard Clifton” and, thinking that the warrant referred to him, he offered no resistance to the arrest. Mr. Upshon, for his part, had apparently made the mistake of thinking that the plaintiff’s first name was indeed “Edward”, an error which

may have arisen from the fact that by some of his friends he is known as “Ted Clifton”. The plaintiff’s evidence is, however, that his name is not and never was “Edward” and that he is never known as “Edward Clifton”, though he admitted that if he had noticed that the name on the warrant was “Edward” he would not have pointed it out to the defendant as he felt no doubt that the defendant had authority to arrest him, and was more concerned about what the charge was. The explanation of this statement may be that subsequently he appeared before a resident magistrate’s court in Dar-es-Salaam and stood trial on the customs charge to which the warrant was intended to relate. Although he was ultimately acquitted of the offence charged it is not impossible that he was to some extent expecting a visit from the customs officials in January, 1964, and the defendant’s evidence was that, when confronted with the warrant, the plaintiff did not seem surprised.

At the time of the arrest the plaintiff, who was then a director of a film company and a managing director of a picture theatre company in Nairobi, had several numbers of his staff present in the office with him. He was told by either the defendant or Mr. Upshon that he must accompany them to the magistrate’s court in Nairobi and that a seat had been reserved for him on a plane leaving for Dar-es-Salaam that afternoon. Before leaving his office he was able to arrange for his advocate to appear with him before the magistrate, after which the plaintiff, the defendant and Mr. Upshon all went to the Law Courts, where they stayed for about an hour and a half outside the magistrate’s room apparently waiting for the plaintiff’s legal advisers to arrive. The defendant then took the plaintiff in a private car to lunch in a restaurant, where the plaintiff was joined by his wife, after which the defendant brought the plaintiff back to the Law Courts. He arrived there at a quarter past two and found his advocate awaiting him in the corridor outside the magistrate’s court, together with Mr. Treadwell, counsel representing the customs authorities, and Mr. Shah, a co-director with the plaintiff in one of the companies mentioned.

In his evidence relating to this meeting the plaintiff said that on arrival he spoke to his advocate who asked him what it was all about, to which the plaintiff replied that he did not know what the charge was but that it alleged some offence under the customs law and that the prosecution wished to bring him to Dar-es-Salaam. His advocate was then handed the warrant by either Mr. Treadwell or the defendant himself and showed it to the plaintiff. It was apparently at this point that the error on the face of the warrant was first noticed by the plaintiff, and his advocate immediately said that he “would take care of the matter”. They then entered the court and the hearing before the magistrate commenced. There is no evidence that at this stage either the defendant or Mr. Treadwell were informed of the error with a view to avoiding the necessity for the plaintiff to appear and the hearing apparently went on without their knowing the true position. In the course of his opening address to this Court the advocate for the plaintiff agreed that neither the defendant nor Mr. Treadwell had had any option at the hearing before the magistrate but to proceed with the matter until the magistrate’s direction for the plaintiff’s release had been obtained.

The original file of proceedings in the magistrate’s court was put in evidence from which it is clear that after the defendant had formally proved the arrest Mr. Upshon gave evidence of identification, stating that he was the investigation officer in the case, that he knew that the plaintiff was the person against whom a charge had been laid in the Dar-es-Salaam District Court in Criminal Case No. 3584 of 1963, and that the plaintiff’s name, so far as Upshon was aware, was “Edward Bernard Clifton”. The plaintiff had then given evidence to the effect that his full name is “Edgar Bernard Clifton”, and not “Edward Bernard Clifton”, whereupon Mr. Treadwell had immediately addressed the magistrate

and stated that, in view of the evidence, the application must be dismissed and the plaintiff released, and this had been done.

In his evidence to this Court the defendant said that the question of the error in the name on the warrant was first raised, so far as he knew, at the hearing in the Nairobi Magistrate's court and took him greatly by surprise. It also appeared that the period during which the plaintiff was under arrest was from about 10 o'clock in the morning until a quarter past three o'clock in the afternoon of the same day, and that at no time was he handcuffed or taken to prison. Evidence was also given by Mr. Garwell, who is a chief investigation officer of the customs and excise, to the effect that both in his official capacity and socially he was acquainted with the plaintiff, whom he normally called "Ted", and that, as the defendant's superior officer, he had given the order beforehand to the defendant to arrest the plaintiff. It also appeared from the evidence of the defendant that no express apology had been tendered to the plaintiff for what had taken place.

Despite the passage of time since the principal events in the case occurred there was, on the whole, remarkably little conflict of evidence and I should say that I was struck by what appeared to me to be the truthfulness and candour in the witness box of both the plaintiff and the defendant.

Any question that might have arisen as to whether these events constituted technically the arrest and imprisonment of the plaintiff has been avoided by counsel for the defendant conceding that they did so, and on the evidence tendered the plaintiff claims general damages for false imprisonment together with special damages of Shs. 1,000/- being the fee admitted to have been paid by him to his advocate for making the representations before the senior resident magistrate at Nairobi which secured the plaintiff's release.

The defence was shortly as follows:

- (1) that the defendant is protected by the joint effect of s. 5 of the Customs Act and s. 31 of the Police Act (Cap. 84);
- (2) that by virtue of s. 5 of the Customs Act and s. 30(1) of the Police Act the defendant is entitled to rely upon the correctness of the warrant until the plaintiff disproves that his name is "Edward Bernard Clifton", and that, in any event the error in the warrant (if there be an error) is so small as to justify the application of the de minimise rule;
- (3) that the plaintiff having been afforded a reasonable opportunity before being arrested to satisfy himself that the warrant applied to him and not having objected to the fact that he was referred to therein as "Edward" must be assumed to have consented to the form of the warrant and to his arrest and imprisonment, and the doctrine of volenti non fit injuria applies;
- (4) that by not pointing out to the defendant the error on the face of the warrant (if there be an error) the plaintiff impliedly represented that the warrant referred to him, upon which representation the defendant relied to the extent that he altered his position, and the plaintiff is now estopped from denying the truth of the representation;
- (5) that if the foregoing defences fail, but not otherwise, the defendant relies upon s. 171 of the Customs Act;
- (6) that if the plaintiff is entitled to succeed he should be awarded general damages in a nominal amount only since no actual damage was proved, and should be awarded by way of special damages only such sum as may be reasonable.

At an early stage of the proceedings I indicated to counsel what I then considered to be the substantial issues in the case but in view of the very full arguments subsequently submitted by both sides and the concessions made by the defendant I am of the opinion that the issues can now be said to be substantially those raised by the foregoing submissions on the part of the defendant. I shall therefore deal with them, so far as necessary, in that order.

Section 5 of the Customs Act declares that for the purpose of carrying out the provisions of the Act, “every officer shall, in the performance of his duty, have all the powers rights privileges and protection, of a police officer of the territory in which such officer so performs his duty”. There can be no doubt that the defendant is a customs officer and that the arrest and imprisonment complained of were effected by him in the performance of his duty and it is therefore necessary to see what protection would have been afforded to him had he at the time been a police officer. Section 31 of the Police Act, which is relied on by the defendant, provides that “no action shall be commenced or prosecution instituted against any police officer in respect of anything done or purporting to have been done by him under the provisions of this Act, unless at least one month before the commencement of the action or the institution of the prosecution notice in writing of the action or prosecution, and particulars thereof, have been given to the police officer and to the officer in charge of the Force in the place where the act complained of was committed”. The relevance of this contention lies in the fact that the letter written on behalf of the plaintiff by his advocates, notifying the defendant of the action and giving particulars, although dated May 20, 1964, did not reach the defendant until May 31, which was less than one month before the date of filing of the suit, namely, June 25, 1964, and that furthermore no notice was sent or given to the officer in charge of the customs officers at Nairobi.

It is clear, however, that the protection afforded to police officers by s. 31 is confined to cases of proceedings arising in respect of acts done or purporting to have been done by them under the provisions of the Police Act itself and does not extend to acts done by the police under the Customs Act (or, for that matter, under any other Act) unless they could be said to have been done also under the Police Act. In the absence of any authority to the contrary, none being cited, I must hold that the extension of the protection of s. 31 to customs officers accordingly applies likewise only to acts done or purporting to have been done under the Police Act and does not extend *mutatis mutandis* to acts done under the Customs Act. There is no evidence that the defendant at the relevant time was acting otherwise than under the Customs Act and accordingly s. 31 of the Police Act affords him no protection. No other provision of either Act was relied upon in this connection and I therefore hold that the defence based on the joint effect of s. 5 of the Customs Act and s. 31 of the Police Act fails. Counsel for the defendant expressly disclaimed any reliance upon s. 136 of the Customs Act and accordingly that section need not be considered.

The defendant next relied upon the joint effect of s. 5 of the Customs Act and s. 30(1) of the Police Act, the latter of which provides that

“where the defence to any suit instituted against a police officer is that the act complained of was done in obedience to a warrant purporting to be issued by a judge, magistrate, or justice of the peace, the Court shall, upon production of the warrant containing the signature of the judge, magistrate or justice of the peace, accept such warrant as *prima facie* evidence of the due making thereof, and upon proof that the act complained of was done in obedience to such warrant enter judgment in favour of such police officer.”

There is no question here as to the due making of the warrant but the argument

of counsel is that the name shown thereon was intended to be that of the plaintiff and was “at least substantially correct”, the degree of error being similar to a spelling mistake, and that the onus rests on the plaintiff to establish that his name is not “Edward”. I cannot hold that this provision, which is intended primarily to protect officers who have acted upon a warrant the validity of which has been challenged, can be extended to protect them in arresting a person other than a person bearing the name shown on the warrant. The plaintiff has sworn that his lawful name is “Edgar Bernard Clifton”, that he is also called “Ted Clifton” but never “Edward”, and, in the absence of any evidence to the contrary, I must assume that the name shown on the warrant is not the lawful name of the plaintiff. I do not think there is room here for the application of the *de minimis* rule, as might have been the case if the error involved had been one of mere spelling, nor can I say that because the plaintiff’s friends frequently called him “Ted” his name has become “Edward”. “Ted” may well be as suitable an abbreviation for “Edgar” as for “Edward”. It may be that the warrant was intended to refer to the plaintiff, though the magistrate by whom it was signed was not called to prove this, but, even if he had been, the arrest still could not be said to have been effected “in obedience to” the warrant although it might have been in compliance with the badly expressed intention of the issuing authority. Section 30(1) does not grant protection where the act done was merely in purported or intended obedience, instead of in actual obedience, to the terms of the warrant and, since the liberty of the subject is involved the court should be slow to give to the section an extended meaning. This line of defence must also fail.

The third submission on behalf of the defendant was that of *volenti non fit injuria* and was based on the fact that the plaintiff at the time of the arrest either was aware, or had had an adequate opportunity to make himself aware, that the name shown on the warrant was “Edward Bernard Clifton” and that nevertheless, without pointing this out to the defendant, he allowed himself to be arrested and detained. Although the advocate for the plaintiff contended that this defence is not applicable to an action for false imprisonment the true position appears to be that it can be raised in all claims in tort and the passage to this effect in *Salmond on Torts* (13th Edn. at p. 43), namely, that no act is actionable as a tort at the suit of any person who has expressly or impliedly assented to it, was approved by Slessor, L.J., in the Court of Appeal in England in *Chapman v. Ellesmere (Lord)* (1), [1932] 2 K.B. at p. 463. The position is stated slightly differently by the editors of *Clerk and Lindsell on Torts* where, in para. 87 of the 12th Edn., it is said that “it is not consent to a tort which renders it unactionable, but knowledge of the facts prevents the existence of any wrong on the part of the defendant”. The “knowledge” referred to is, of course, that of the plaintiff and, applying this statement of the principle to the present case, the question is: did the plaintiff know that he need not have submitted to the defendant’s requirement of arresting him and taking him to the magistrate’s court? It is not sufficient for the defendant to say that the plaintiff, had he cared to read the warrant closely, could have informed himself of the position or that, by wrongly and carelessly assuming that the warrant applied to him, he cannot now complain that it did not. I am satisfied that both parties were genuinely mistaken as to the position at the time of the arrest, the plaintiff having, perhaps thoughtlessly assumed that the warrant was a valid and effective warrant authorising his apprehension, and the defendant having allowed himself to be persuaded that the correct name of the plaintiff was as shown on the warrant. There was a conflict of evidence as to whether the defendant at the time of the arrest read out to the plaintiff from the warrant the names “Edward Bernard Clifton” but, whatever may be the true position as to that, since the fact of the

arrest is admitted I consider that the onus of justifying it lies on the defendant and I am satisfied that the plaintiff was made to appreciate that the name “Edgar” did not appear on the warrant and that therefore he need not have allowed himself to be placed under arrest. In my opinion the onus on the defendant in this regard has not been discharged and the defence of *volenti non fit injuria* cannot succeed.

Fourthly, and as an alternative to *volenti non fit injuria*, the defendant pleaded that, by not having pointed out to him the error on the face of the warrant and by permitting the defendant to act on the warrant as if it had in fact applied to the plaintiff, the latter is estopped from denying the lawfulness of the detention. In his argument counsel for the defendant contended that at the time of the arrest the defendant was endeavouring to ascertain whether the plaintiff was the person to whom the warrant related, as the plaintiff must well have known, and that the latter’s conduct amounted to the making of a representation to the defendant to the effect that he, the plaintiff, was the person referred to in the warrant, a representation upon which the defendant relied to change his position vis-à-vis the plaintiff. The advocate for the plaintiff sought to displace this argument by the submission that, before the defendant could succeed on it, he must establish (a) that there had been a representation by the plaintiff to the defendant; (b) that he, the defendant, had acted on the representation; and (c) that the defendant’s position had been altered by so acting. Although at first it might appear that this argument on the part of the defendant is indistinguishable from that based on *volenti non fit injuria*, the two are not identical and require separate consideration. The estoppel pleaded is in the nature of an equitable estoppel and the problem raised should be approached with due regard to the realities of the situation. Whatever transpired by word of mouth between the parties in the plaintiff’s office on January 8, 1964, I do not think it can be denied that by the time they were leaving the office both of them were under the impression that a valid warrant for the arrest of the plaintiff had been issued and that the defendant was a customs officer who had been furnished with the warrant and directed to execute it and was doing no more than what he was legally authorised to do, and it would also appear that the plaintiff was raising no objection or enquiry about it. It is therefore necessary to examine the facts more closely in order to determine how this position had arisen. On arrival at the office and in obedience to Mr. Upshon’s statement that the plaintiff was the person whom the defendant was seeking, the defendant approached the plaintiff, produced to him his identity card, informed him of the object of the visit, stating that he had a warrant for his arrest, and laid the warrant on the plaintiff’s desk at about two feet distance from where the plaintiff was sitting. It is not necessary to speculate as to why the plaintiff did not look more carefully at the warrant or why he felt satisfied, on seeing the name “Clifton”, that the warrant referred to him. Had he been more surprised than he was he might have been less acquiescent and would have perhaps suggested to the defendant the possibility of a mistake having been made. Had he done so the error on the face of the warrant would immediately have come to light and, save perhaps for an apology, nothing more would have been heard of the matter. As it was, however, the plaintiff, by accepting the position without demur, gave to the defendant what, in my opinion, can be described only as an unmistakable indication that, in the plaintiff’s view, the defendant was acting correctly in effecting the arrest and that the plaintiff would place no obstacle in his way. This is supported by the plaintiff’s statement in re-examination that if he had observed that the name on the warrant was “Edward” he would not have pointed it out; to the defendant and that he had no doubt that the defendant had authority to arrest him. That this was his attitude of mind is

borne out also by the fact that he subsequently appeared in court in Dar-es-Salaam, voluntarily and not under arrest, to answer the charge to which the warrant in the present case relates.

In support of this branch of his argument counsel for the defendant relied upon the decision of the (House of Lords in *Cairncross v. Lorimer* (2), where, it was laid down that, in the words of the Lord Chancellor, it is a doctrine to be found in the laws of all civilised nations, that if a man, either by words or by consent, has intimated that he consents to an act which has been done, and that he will offer no opposition to it, although it could not have been lawfully done without his consent, and he thereby induces others to do that from which they otherwise might have abstained, he cannot question the legality of the act he had so sanctioned, to the prejudice of those who have so given faith to his words, or to the fair inference to be drawn from his conduct. "I am of the opinion", he said, "that, generally speaking, if a party having an interest to prevent an act being done, has full notice of its having been done, and acquiesces in it, so as to induce a reasonable belief, that he consents to it, and the position of others is altered by their giving credit to his sincerity, he has no more right to challenge the act to their prejudice, than he would have had if it had been done by his previous licence".

In that case the appellants, a minority of the members of a church congregation which by the vote of the majority and with the acquiescence of the minority, had amalgamated with another congregation, sought to have themselves declared entitled to the church property which had belonged to the original congregation prior to the amalgamation; but the House of Lords, affirming the decision of the Court of Session in Scotland, held that the appellants, by reason of their having failed to object in due time to the amalgamation, could not succeed. There the material events comprised two elements, namely, the acquiescence on the part of the appellants in the amalgamation and the carrying out by the respondents of the amalgamation itself, and the court in effect held that the part played by the appellants in regard to the first element disentitled them from complaining against the part played by the respondents in regard to the second. In the present case the essential facts, so far as relevant to this issue, may be stated as being that the plaintiff, although afforded by the defendant an adequate opportunity to examine the name on the warrant and, if he thought fit, to challenge the legality of his arrest and imprisonment, indicated by his actions in the clearest manner that he was prepared to regard himself, and did regard himself, as being the person referred to in the warrant and therefore that he was offering no objection to being arrested and detained. The first element is the acquiescence on the part of the plaintiff in his own arrest and the second is his detention or imprisonment by the defendant immediately following upon the arrest.

The defendant admits the arrest and the technical imprisonment but contends that the plaintiff cannot be heard to complain of the imprisonment as being "false" on grounds analogous to those that were accepted in the *Cairncross* case (2). For the plaintiff, on the other hand, it was said (a) that even if he had known that he was not the person referred to in the warrant he was under no duty to point that fact out to the defendant: (b) that there was no evidence of any representation by the plaintiff; (c) that even if there was a representation the defendant had acted, not upon the representation, but upon the evidence of Mr. Upshon; and (d) that the defendant's position in the matter had not been altered. I agree that there was no legal duty resting on the plaintiff to inform the defendant of the error on the face of the warrant but if, by withholding that information when it was not only within his power to give it to the defendant but also very much in his interest to ensure that the information was received by the defendant, the latter was misled by the silence of the plaintiff,

the plaintiff cannot be allowed to found a claim for damages for the detention which inevitably followed, as he well knew it would. As to the plaintiff's contentions at (b), (c) and (d) I am satisfied that his conduct amounted to the making of a representation to the defendant that the warrant entitled the latter to arrest and detain the plaintiff for the purpose of having him placed on trial in Dar-es-Salaam, that the defendant acted on the representation supporting, as it did, the statement of Mr. Upshon as to the identity of the plaintiff, and that, as these present proceedings illustrate, the defendant's position has been substantially altered by his so doing. For these reasons I consider that this ground of defence succeeds.

The distinction, to which I have alluded, between this plea of estoppel and the argument based on the doctrine of *volenti non fit injuria* was recognised in the *Cairncross* case (2), for there the House held that, although both lines of defence would have been open to the respondents if the facts had supported them, the evidence was not sufficiently strong to justify reliance upon *volenti non fit injuria* but did enable the respondents to rely on the estoppel.

Furthermore, it is clear that the *Cairncross* case (2) is not to be regarded as a decision tied to its own particular facts and circumstances, for in relation to other facts and circumstances it was applied by the House of Lords in *Houghton v. Nothard, Lowe & Wills, Ltd.* (3); by the Privy Council in *Sarat Chunder Dey v. Gopal Chunder Lala* (4); by the Court of Appeal in England in *In re Eaves; Eaves v. Eaves* (5); and by Simonds, J., in *Re William Porter & Co., Ltd.* (6). In *In re Eaves* (supra) Clauson, L.J., citing the *Cairncross* case (2) as his authority, said (3 L.T. at p. 117):

"It is well settled that if a party has so acted that the fair inference to be drawn from his conduct is that he consents to a transaction to which he might quite properly have objected, he cannot be heard to question the legality of the transaction as against persons who, on the faith of his conduct, have acted on the view that the transaction was legal";

and to this he adds, on the authority of *Sarat Chunder Dey v. Gopal Chunder Lala* (4) (supra), that

"the principle applies even if the party whose conduct is in question was himself acting without full knowledge or in error".

The action accordingly fails and therefore it will not be necessary for me to consider the final ground of defence put forward, namely, that founded on s. 171(3) of the Customs Act, upon which counsel for the defendant expressly stated that he would rely only if he should fail upon all his other grounds. I think, however, that, lest this matter should go elsewhere and my decision be reversed, I should indicate my views as to the damages to which in that event the plaintiff might be held to be entitled, as to which I had the advantage of hearing counsel.

Counsel for the plaintiff submitted that false imprisonment is actionable per se, general damages need not be proved, nominal damages can be awarded only in exceptional circumstances such as where the imprisonment was momentary, and the conduct of the plaintiff is quite immaterial, and that in the present case the plaintiff is entitled to substantial general damages without proof of loss. I am unable to accept this submission in its entirety. There is no doubt that false imprisonment is technically actionable per se and that in certain cases, as where the plaintiff's reputation might have been materially injured, proof of damages may well be unnecessary to justify even a substantial award. But, just as the circumstances surrounding the false imprisonment may in themselves constitute a source of aggravation of the actionable damage, so also, in my view, may those circumstances have, to some extent at least, an ameliorating effect

in regard to both the extent to which the plaintiff may be said to have been actually damaged and the extent to which the defendant can properly be held to have been responsible for the damage suffered. I have not been able to find this proposition so stated in any work of authority to which I have had access, but it does appear to me to be capable of justification as the juridical basis upon which the determination of the quantum of damages in a case such as the present can best be approached.

The evidence in this case shows that the customs authorities in Tanganyika had formed the view, apparently quite wrongly, that the plaintiff had committed an offence under ss. 149(e) and 154 of the Customs Act, and the issue of the warrant under which the plaintiff was arrested was one of the steps taken by or at the instance of those authorities to bring him to trial. Although the plaintiff was subsequently tried and acquitted on this charge I am satisfied that he was not very surprised to learn of the warrant which was issued or to receive a visit from a customs officer on January 8, 1964. I am not satisfied, however, particularly in view of the outcome of the proceedings in the magistrate's court in Nairobi and of his subsequent acquittal in Dar-es-Salaam, that the events which took place on January 8 had any materially harmful effect on the plaintiff's business or reputation. The events themselves were attended with the minimum of publicity, the plaintiff was at no stage hand-cuffed or taken to gaol or placed in a police van, and any surprise that may have been occasioned to his staff by his departure from his office in the morning would have been dissipated by his triumphant return from court in the afternoon. If, however, it could be said that his general reputation must have suffered in some way from his detention for nearly six hours, or that his business must have suffered by his absence for that time, can it be said that the entire responsibility for that detention, and therefore for the damage, rests solely upon the defendant? The failure of the plaintiff to take advantage of the facility afforded to him by the defendant to verify by personal inspection that the warrant referred to him is a contributing factor which cannot be ignored, for it creates the position that the plaintiff had, if not necessarily the last, at least an adequate, opportunity to prevent his arrest and imprisonment ever taking place. Then it is said that the defendant, on discovering the mistake that had been made, did not apologise to the plaintiff. From a realistic point of view this appears to me to matter not at all since the discovery was followed directly by the much more salutary and effective action on the part of counsel for the defendant, namely, his application to the magistrate for the immediate release of the plaintiff. Bearing these various considerations in mind, I would measure the plaintiff's general damages in the matter a Shs. 100/-.

The special damages claimed amount to the sum of Shs. 1,000/- and consist of professional legal fees paid by the plaintiff to the advocate who appeared for him in the magistrate's court in Nairobi. The defendant concedes that this substantial fee was in fact paid to the plaintiff's advocate for his modest services in the case but submits that the plaintiff should be entitled to reimbursement by way of special damages only of such portion of that sum as the Court may think reasonable. There was no evidence to show how or when the amount of this fee was arrived at nor was it suggested that the plaintiff could not himself have had the proceedings in the magistrate's court withdrawn forthwith by the simple expedient of drawing the attention of the defendant or his counsel to the error on the face of the warrant. I am unable to see that the plaintiff's advocate could have rendered; any greater service to the plaintiff than that which he did, in fact, render, namely, to prove that the plaintiff's name was not "Edward Bernard Clifton" and then to lend his support to counsel for the defendant when the latter applied to the magistrate for the plaintiff's release. There was no room for argument or doubt and the magistrate immediately granted the

defendant's application to have the plaintiff released. Unquestionably the plaintiff was entitled, either at the time of his retaining the services of his advocate or subsequently, to make what agreement he wished as between his advocate and himself as to the amount of the fee to be charged and had the sum fixed been one thousand guineas instead of one thousand shillings the plaintiff would still have been within his rights. But that does not mean that in a case such as the present the defendant, if liable to pay to the plaintiff the special damages suffered by the latter in the matter, can be compelled inevitably to pay any sum upon which the plaintiff may have seen fit to agree with his professional advisers. The duty which a plaintiff owes to a defendant to mitigate his damage should, I think, apply in a proper case and within proper limits no less to special damages than to general damages and I am not satisfied that in this case the plaintiff has discharged his obligations in that respect. In these circumstances it falls to the Court to fix a proper sum to be paid by way of special damages. It was stated from the Bar that the plaintiff's advocate received his instructions in the matter shortly before lunch on the particular day and considered them during lunch-time. The proceedings in the Magistrate's Court appear to have been brief. Assuming that the advocate's attention was occupied for, at the most, three hours, that is, from shortly after mid-day until shortly after three o'clock (including lunch-time), and applying the rate of Shs. 84/- per hour under the provisions of Schedule V (5) of the Remuneration of Advocates Order, 1962, which is the rate of remuneration laid down for work when based on the time engaged, we get the figure of Shs. 252/-. In my opinion this sum should constitute the quantum of any award to be made to the plaintiff by way of special damages.

The suit will be dismissed, but in view of the fact that a considerable portion of the hearing was taken up in the consideration of submissions upon which the defendant failed and having regard to the circumstances of the case as a whole I will direct that each party shall bear his own costs.

Action dismissed.

For the plaintiff:

J. K. Winayak & Co., Nairobi

J. K. Winayak

For the defendant:

The Legal Secretary, E.A.C.S.O.

M. W. Christian (Asst. Legal Secretary, E.A.S.C.O.)

Saleh Bin Ali v Republic
[1966] 1 EA 55 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	12 November 1965
Case Number:	115/1965
Before:	Rudd Ag CJ and Madan J
Sourced by:	LawAfrica

[1] Delegation – Criminal law – Corruption – Consent in writing of Attorney-General or Solicitor-General required for institution of prosecution – Attorney-General empowered to delegate his power to Senior State Counsel Coast Province – Consent signed by person as Acting Senior State Counsel, Mombasa – Whether prosecution instituted with necessary consent – Prevention of Corruption Act (Cap. 65), s. 12 (K.).

Editor's Summary

The appellant was convicted of corruption. Under s. 12 of the Prevention of Corruption Act the institution of the prosecution required the consent in writing of the Attorney-General or Solicitor-General, but under s. 38 of the Interpretation and General Provisions Act the Attorney-General is empowered to delegate his power under s. 12 *ibid*. Such power was delegated to the person for the time being holding the office of Senior State Counsel, Coast Province but the consent to the prosecution was signed by one N. as Acting Senior State Counsel, Mombasa. On appeal the only point argued was whether the prosecution was instituted with the necessary consent and the respondent was allowed to adduce additional evidence to the effect that prior to the signing of the consent N. was appointed by the Attorney-General to occupy the post of Senior State Counsel, Mombasa, and to discharge the functions and duties of the office of the Senior State Counsel, Coast Province, and that the Senior State Counsel stationed at Mombasa was and always has been responsible for discharging the duties of Senior State Counsel, Coast Province.

Held – although N. acted inappropriately in describing himself as Acting Senior State Counsel, Mombasa, when he signed the consent, nevertheless the consent was signed by the person for the time being lawfully discharging the functions of the holder of the office of Senior State Counsel, Coast Province and accordingly the consent was therefore valid.

Appeal dismissed.

No cases referred to in judgment.

Judgment

Rudd Ag CJ, read the following judgment of the Court: On June 18, 1965, the appellant pleaded guilty to a charge of corruption contrary to s. 3 sub-s. (2) of the Prevention of Corruption Act (Cap. 65) of the Laws of Kenya. The charge alleged that he corruptly gave Shs. 5/- to a police constable as an inducement to the constable to release the appellant from lawful custody.

The facts as stated in the lower court were that the appellant was arrested by two police constables for an offence of hawking clothes without a licence in Mombasa and as he was being escorted to the Central Police Station he gave one of the constables Shs. 5/- and asked him to take the money and release the appellant. The appellant was sentenced to three months' imprisonment.

This appeal was brought against conviction and is based upon a contention that there was no proper sanction for the prosecution and therefore the conviction was *ultra vires* and without jurisdiction.

Under s. 12 of the Act the institution of the prosecution required the consent in writing of the Attorney-General or Solicitor-General, but under s. 38 of the Interpretation and General Provisions Act

the Attorney General is empowered

to delegate his power under s. 12 of the Prevention of Corruption Act. By Government Notice No. 338 of 1963 the Attorney-General delegated the power conferred by s. 12 of the Prevention of Corruption Act then an Ordinance to consent to the prosecution for an offence against that Ordinance inter alios to the person for the time being holding the office of Senior Crown Counsel, Coast Region, if the amount of the inducement alleged does not exceed Shs. 1000/-. As a result of constitutional changes since the date of that notice the notice has now to be read as delegating the power to consent to the person for the time being holding the office of Senior State Counsel, Coast Province. The file of the proceedings in the lower court contains a written consent to the prosecution dated June 3, 1965, and signed by O. P. Nagpal as acting Senior State Counsel, Mombasa. No question was raised before the lower court as to the adequacy of this consent.

The only point argued, and indeed the only point that could have been argued in this Court against the conviction, was the matter as to whether the prosecution was instituted with the necessary consent. It is clear that the written consent upon the lower court file is not in itself sufficient to establish the necessary consent, in as much as it does not purport to have been given by the Senior State Counsel, Coast Province. If this matter had been raised before the lower court it would have been open to the prosecution to adduce evidence to show that Mr. Nagpal was in fact, at all material times, acting as Senior State Counsel, Coast Province and if this fact had been properly established we think that the consent would have been an effective consent. If there were any doubt as to that the matter could have been put right very quickly.

On the hearing of the appeal we allowed State Counsel to adduce evidence directed to showing the extent of Mr. Nagpal's authority. The additional evidence was not objected to by counsel for the appellant and consisted of an affidavit by the Honourable Attorney-General and evidence given before us by Mr. Nagpal. The substance of this evidence was not disputed. The Attorney-General's affidavit showed that Mr. Nagpal was appointed by the Public Service Commission of Kenya to act in the grade of Senior State Counsel in the Attorney-General's Chambers with effect from December 7, 1964, that since December 7, 1964, Mr. Nagpal has been acting in the grade of Senior State Counsel, that in December, 1964, the Attorney-General appointed Mr. Nagpal to occupy the post of Senior State Counsel, Mombasa, and to discharge the functions and duties of the office of the Senior State Counsel, Coast Province, that no other official has occupied the said post or the said office since December 7, 1964, and that the Senior State Counsel stationed at Mombasa is and always has been responsible for discharging the duties and functions of Senior State Counsel, Coast Region, now the Coast Province and the appointment to the post is an administrative appointment made by the Attorney-General from within the grade of Senior State Counsel in the Attorney-General's Chambers.

Mr. Nagpal in evidence confirmed this evidence and in particular he confirmed that the Attorney-General had appointed him to the post of acting Senior State Counsel, Mombasa, to act in discharge of the functions and duties of Senior State Counsel in the Coast Province.

The only other fact that requires to be stated is that Gazette Notice No. 1206 published on April 6, 1965, intimated that Mr. Nagpal was appointed to act as Senior State Counsel, Mombasa, with effect from December 8, 1964.

Section 49 of the Interpretation and General Provisions Act provides as follows:

"In this Act and in any other written law instrument, warrant or process of any kind, any reference to a person holding an office shall include a reference to any person for the time being lawfully discharging the functions of that office."

The delegation contained in Legal Notice No. 338 of 1963 is subject to be interpreted in accordance with s. 49 of the Interpretation and General Provisions Act and as a result it must be taken as including a delegation of power to the person for the time being lawfully discharging the functions of the office of Senior State Counsel, Coast Province. In view of the evidence adduced in this Court, which was not in any way questioned, it appears that at the time in question the Acting Senior State Counsel, Mombasa was performing the duties of the Senior State Counsel, Coast Province and Mr. Nagpal was in fact the officer lawfully performing the functions of the office of Senior State Counsel, Coast Province. We therefore find that although he acted inappropriately in describing himself as acting Senior State Counsel, Mombasa, when he signed the consent, nevertheless the consent was signed by the person for the time being lawfully discharging the functions of the holder of the office of Senior State Counsel, Coast Province. The consent was therefore valid and the appeal against conviction is dismissed.

Although the value of the corrupt inducement in this case is relatively trivial, it is important that members of the Police Force should not be subjected to any sort of corrupt inducement. It is possible that the requirements of justice could have been satisfied by a lesser punishment, since the case is a relatively minor case of corruption, nevertheless no case of corruption can be considered as being trivial and we are unable to say that the sentence was manifestly excessive.

Appeal dismissed.

For the appellant:

Swaraj Singh, Nairobi

For the respondent:

The Attorney-General, Kenya

J. R. Hobbs (Senior State Counsel, Kenya)

**Nairobi City Council v The Nairobi City Valuation Committee and the
Commissioner of Lands**
[1966] 1 EA 57 (SCK)

Division:	Supreme Court of Kenya at Nairobi
Date of judgment:	8 March 1965
Case Number:	6/1964
Before:	Farrell J
Sourced by:	LawAfrica
Appeal from:	The Valuation Committee at Nairobi.

[1] *Rates – Improvement in relation to unimproved value – Whether demarcation by surveyed becomes an “improvement” – Rating Act (Cap. 266) s. 9(2) (K.).*

[2] Rates – Rateable unit – Approved scheme – Survey completed and roads made – Whether land to be valued as a single unit or as individual plots.

Editor's Summary

A block of Crown Land in Nairobi of an irregular shape was divided by survey into 116 potential plots and road reservations under an approved scheme. The unimproved value of each portion was assessed separately for rating purposes with an aggregate value in the draft supplementary roll for 1962 of Shs. 713,500/-. After objections being made by the Commissioner of Lands the Valuation Committee attributed a single value to the undivided land of Shs. 350,000/-, giving no reasons. The reduction in value was assumed to be due to the choice of the whole block as the rateable entity, a procedure derived from the *Municipality of Mombasa v. Nyali Ltd.*, [1963] E.A. 330 (the *Nyali* case). On appeal to the Supreme Court the appellant contended that various amendments to the Local Government (Rating) Ordinance (Cap. 137 of 1948) made after the date of valuation in the *Nyali* case required the assessments to be made on each potential

plot. Such a contention assumes that demarcation under a scheme is not to be regarded as an “improvement” thereby enabling the valuer to take account of the scheme when determining the size of the rateable unit as well as when assessing the unimproved value.

Held –

- (i) the *Nyali* case (supra) must be regarded as a decision on a law that was no longer in force and as neither binding nor a safe guide on similar questions falling for decision under the existing law;
- (ii) when assessing the value of unimproved land the existing law does not require that the demarcation of a scheme should be regarded as an improvement;
- (iii) s. 4(1)(c) of the Rating Act (Cap. 226) required the subdivided plot to be taken as a rateable unit.

Appeal allowed. Order accordingly.

Cases referred to in judgment:

- (1) *Municipality of Mombasa v. Nyali Ltd.*, [1963] E.A. 330 (C.A.).
- (2) *Maori Trustee v. Ministry of Works*, [1958] 3 All E.R. 336.

Judgment

Farrell J: This appeal from the decision of the Nairobi City Valuation Committee concerns the method of valuation for rating purposes of a block of Crown Land in Shauri Moyo. The blocks are coloured yellow on the small-scale plan (Ex. 1), from which it appears that the land consists of one large block, somewhat in the shape of a capital “E”, and four smaller “islands”, separated from the larger block and from each other by road reservations (subsequently converted in fact into actual roads). The whole area is divided into 116 plots under a subdivision scheme, duly approved and completed by survey. The Valuation Committee resolved that the plots must be valued in one block at a valuation of Shs. 350,000/-. The City Council submits that each individual plot should be treated as a separate unit for rating purposes, as was done in the Second Draft Supplementary Roll for 1962, under which separate values were entered against each plot, amounting in the aggregate to Shs. 713,500/-. No question arises as to the correctness of the amount of the valuation in either case, and the sole issue is whether the plots should be valued in one block as a single unit, or as 116 individual plots.

Although the chairman of the Valuation Committee has not stated the grounds for the decision, it is agreed that the committee considered itself bound by the decision of the Court of Appeal in *Municipality of Mombasa v. Nyali Ltd.* (1) (to which I shall refer as “the *Nyali* case”). Counsel for the appellant submits that the decision is no longer binding on this court as having been decided under a different statute. It may be mentioned here that the former Local Government (Rating) Ordinance (Cap. 137 of the 1948 Revision) to which I shall refer as the “old law”, under which the *Nyali* case (1) was decided was repealed and substituted by the Local Government (Valuation and Rating) Ordinance, 1956, which now appears, under the shortened title of “The Rating Act”, as Cap 266 in the 1962 Revision.

In order to determine if and to what extent the *Nyali* case is binding on this court, it is necessary to look at the judgment in some detail. It is not easy to summarise the grounds of the decision. It will assist, however, if it is borne in mind that the case was mainly concerned with the basis of valuation, which is

not in issue in this case, and only incidentally with the size of the rateable unit.

In the *Nyali* case (1) the Supreme Court had on different occasions come to opposite conclusions as to the appropriate unit of assessment. On a case stated the learned judge had been guided to a large extent by the case of *Maori Trustee*

v. Ministry of Works (2), a Privy Council decision on appeal from New Zealand, and had decided that the land should be assessed in individual plots for the purposes of rating, on the basis that the subdivision was complete and operative and would justify separate valuation of the plots in a case of compulsory acquisition in order to ascertain the total price. In subsequent proceedings the learned judge came to a different conclusion, and held that the land must be rated as one unit or hereditament. It was this later decision which was upheld by the Court of Appeal.

The main judgment in the Court of Appeal was delivered by Gould, J.A., who is reciting the general history of the dispute, set out in full ([1963] E.A. at p. 388) sub-s. (1) of s. 6 of the old law, together with the definitions of “unimproved value” and “improvements”, appearing in s. 2. He then went on ([1963] E.A. at pp. 338-340) to consider the *Maori Trustee* case (2). He said ([1963] E.A. at p. 340A):

“I think the whole question is reducible in each case to the consideration of the language used in the particular legislation governing the question before the court.”

He concluded:

“I would not therefore be inclined to exclude all consideration of the *Maori Trustee* case, unless that approach is inconsistent with the legislation applicable in Kenya.”

The learned judge of appeal then went on ([1963] E.A. at p. 340C) to consider whether the survey of the subdivision, the placing of beacons, and the construction of roads was an improvement within the definition. “If it is”, he said, “and if it is an improvement falling within the phrase ‘thereon or appertaining thereto’ it must be treated as if it has not been made”. It may be noted that the words “thereon or appertaining thereto” to which reference is made appear in the definition of “unimproved value” in the old law, but are not to be found anywhere in the existing enactment.

The conclusion of the learned judge of appeal appears ([1963] E.A. at p. 341G) in the following passage:

“I cannot escape the conclusion that what was done does fall within the definition of improvements. There was work done on the land in the survey, the placing of beacons, and in the formation of roads. The whole appertains to the land. The beacons may be of little intrinsic value in themselves, but they, with the roads, ensure that the benefit of the work was not exhausted at the time of valuation. The roading itself would increase the value of the land and the accompanying survey and marking into plots would increase it still further – in fact this is the very basis of the valuation made for the appellant. Counsel for the appellant has said that the roads were not in any plot, but that is beside the point: they are part of the original block of land upon which the subdivision was carried out. They are private roads.”

After a reference to certain matters which are of little relevance in the present context, the learned judge of appeal concluded:

“For these reasons in my judgment the roads and survey effect improvements and must be regarded, for the purposes of valuation, as if they had not been made.”

The judgment then proceeds to deal with the question of the rateable unit or hereditament ([1963] E.A. at p. 342B). The learned judge of appeal noted that there is no definition of the concept either in the English or Kenya legislation,

and that the fact that the English rating system is generally based on annual value and not unimproved value does not necessarily render the tests laid down in English cases wholly inapplicable to Kenya. “There would be a need for caution, but the tests appear basically to embody a common-sense approach” ([1963] E.A. at p. 342G).

The learned judge of appeal referred to the finding of the learned judge, with regard to subdivision, that the land was not divided in law until legal steps of registration were taken, and that while it was undivided it was one hereditament; and held that this was a question of fact on which the court would not interfere, unless the judge had erred in principle. After expressing agreement with the judge’s finding that the subdivision amounted to an improvement he went on:

“The valuer is enjoined by the Local Government (Rating) Ordinance to ignore it when arriving at the valuation of the unimproved land. When he sets out to value the land he must visualise it as unsubdivided, and that leaves him no basis for saying that he will take separately as rateable units all the plots of the subdivision.”

Later he remarked ([1963] E.A. at p. 343F):

“The practice of the appellant’s valuer . . . to treat as separate rateable units all subdivisional plots beacons and numbered, cannot prevail against the injunction implicit in the definitions of ‘improvements’ and ‘unimproved property’ (sic: the reference is presumably intended to be to the definition of ‘unimproved value’).”

The learned judge of appeal concluded ([1963] E.A. at p. 343G):

“For these reasons I consider that the learned judge was correct when he found that no assistance was to be drawn in the present case from what was decided in the *Maori Trustee* case (2), and that the land must be valued as one unit.”

Looking at the judgment as a whole, I think it is fair to say that, while a variety of considerations were present to the mind of the learned judge of appeal, his decision was to a large extent influenced, not only on the question of the method of valuation but also in determining the size of the rateable unit, by his view, based on the language used in the legislation then in force, that subdivision is an improvement and must be ignored for the purposes of the valuation.

Any decision of the Court of Appeal is of course binding on this court in so far as it deals with the same or similar subject matter and is based on the application of the same law. Where either the subject matter or the law is different, the decision may be an unsafe and misleading guide. In the present instance, while the subject matter in the *Nyali* case was land in private occupation, and in the present case is Crown land, I am inclined to think that no distinction can validly be made on this ground alone. But, as the present law differs in material respects from the law applied in the *Nyali* case (1), and the decision of the Court of Appeal is expressly based on a “consideration of the language used in the particular legislation governing the question before the court”, it is essential to examine with some care the changes effected by the Ordinance of 1956. Such an examination may lead to the conclusion that the new law is in all material respects the same as the old, and that the *Nyali* decision remains of full force and effect. On the other hand, it may bring to light changes either of substance or of phraseology, which may raise a doubt whether the Court of Appeal would necessarily have reached the same conclusion if the law had been the same as it is today. If the latter should be the case, then I conceive that it would be the duty of the court to approach the matter afresh and unfettered by authority, while

deriving as much guidance as possible from the principles laid down by the Court of Appeal in so far as they can still be validly applied.

The main purpose of the 1956 Ordinance is thus stated in the Memorandum of Objects and Reasons published with the Bill:

“It is not possible, under the present Ordinance, in order to arrive at the unimproved value of land, for the valuer to value the land and improvements as a whole and then to deduct therefrom the value of the improvements. At present it is still possible for valuations of unimproved sites to be based on data gathered from current sales and from information of current market prices of vacant plots, but as more and more building proceeds, and as sales of vacant plots become correspondingly more rare, it is becoming increasingly difficult to obtain these data. The time is already rapidly approaching in Nairobi when the position will be reached that, unless valuations are to become a matter of speculation, it is inevitable that the above method of valuing unimproved sites must be used. Clause 9 of the Bill accordingly provides for the inclusion in a valuation roll of the unimproved value of land, based on the freehold value of the land, and not on the values of the various interests subsisting in the land. Valuers will be able to assess the unimproved value of the land by deducting the value of improvements from the capital value of the property. This new provision involves certain new definitions in cl. 2 of the Bill.”

Of the definitions referred to, the definition of “improvements” has been shortened, but not materially altered. The definitions of “unimproved value” and “value of improvements” have been removed from s. 2 and the meaning of the expressions is now to be sought in s. 9. There is an important change in the definition of “rateable property” in so far as an exception is made in favour of “any land used or reserved for roads, streets (including private streets)” etc.

Section 9 was further amended in 1957, and need not be considered at length. Sub-section (1) deals with the value of land, sub-s. (2) with the value of unimproved land and sub-s. (3) with the value of improvements. In each case the method of arriving at the value is set out. Whereas the definition of “unimproved value” in the old law contained the words “If the improvements, if any, thereon or appertaining thereto had not been made”, sub-s. (2) uses instead the words:

“if the improvements, if any, thereon, therein or thereunder, had not been made.”

In the old law “value of improvements” had been defined in s. 2 as follows:

“ ‘value of improvements’ in relation to any land means the added value which the improvements give to such land at the time of valuation irrespective of the cost of the improvements.”

Sub-section (3) of s. 9 in the existing law reads as follows:

“(3) The value of improvements in relation to any land shall, for the purposes of a valuation roll or supplementary valuation roll, be the estimated replacement cost of the improvements on, in or under the land calculated as at the time of valuation, due regard being had to the suitability of the materials used and the works carried out and their age, depreciation and obsolescence.”

The only other change material to these proceedings which it is necessary to mention is that relating to subdivision of property.

In the old law s. 13 proved (inter alia) as follows:

- “13. Notwithstanding anything in this Ordinance contained, it shall be lawful for the local authority from time to time and at any time . . .
- (c) to cause a valuation to be made of any rateable property which is subdivided after the date when the valuation in respect of such property has become final and to cause the valuation to be apportioned according to the subdivisions of the said property, and to cause any rate due in respect thereof to be assessed and collected according to such subdivision.”

In the existing law the matter is dealt with in s. 4 as follows:

- “4(1) It shall be lawful for a local authority, either on their own initiative or at the request of any person from time to time and at any time to cause a valuation to be made as at the time of valuation of –
- (c) any rateable property which is subdivided or consolidated with other rateable property; . . . and to include such valuation in a supplementary valuation roll as hereinafter provided.”

In the light of these changes in the law, the question now to be considered is whether, as the respondent submits, the law remains essentially as it was and the *Nyali* decision (1) still applies, or, as the appellant contends, the changes are sufficiently substantial to render a decision on the old law an unsafe guide for the interpretation of the existing law.

The first finding in the *Nyali* case (1), as stated in the headnote, is that “the survey and making of roads effected ‘improvements’ within the definition in the Ordinance and must be regarded, for the purposes of valuation, as if they had not been made”.

That finding is based on the definition of “improvements” under the old law, and to some extent on the phrase which occurs in the definition of “unimproved value”, namely, “if the improvements, if any, thereon or appertaining thereto had not been made”. From the passage already cited from the judgment (particularly [1963] E.A. at p. 340C and at p. 341G) it is clear that considerable importance was attached to the words “appertaining thereto”. But this phrase has now disappeared from the law, and while the definition of “improvements” is unchanged in so far as it requires them to be “on, in or under the land”, s. 9(2) which corresponds to the former definition of “unimproved land”, substitutes the expression “thereon, therein or thereunder” in relation to improvements for the earlier expression “thereon or appertaining thereto”.

The next point arises to some extent out of the first. While all the incidents of subdivision are regarded as improvements, the element upon which most emphasis was placed in the judgment was the formation of roads (see [1963] E.A. at p. 341 G-H). In that connection the learned judge of appeal remarked ([1963] E.A. at p. 341H):

“Counsel for the appellant has said that the roads were not in any plot, but that is beside the point: they are part of the original block of land upon which the subdivision was carried out. They are private roads.”

Under the new law, roads, whether public or private, are excepted from the definition of “rateable property”, and if the present law had been in force at the time of the *Nyali* decision (1), it would not have been true to say that the roads were “part of the original block”, at any rate for the purposes of rating. If the roads are part neither of the undivided rateable property nor of the subdivisional units, it is at least questionable whether they come within the definition of improvements “on in or under” the land, and if they merely appertain to the land, that is no longer sufficient to bring them within the definition.

It is, of course, arguable that even if the roads are outside the definition of “improvements”, the beacons are an improvement: but it is open to doubt whether the court would have held that they alone amounted to an improvement. The conclusion of the court ([1963] E.A. at p. 342A) is that “the roads and survey effected improvements and must be regarded, for the purpose of valuation, as if they had not been made”. It is, perhaps, not without significance that the beacons are not mentioned in that passage. So far as the survey is concerned it is true, as the court says ([1963] E.A. at p. 341(G), that “there was work done on the land in the survey”, but the reference to “replacement cost of the improvements” in s. 9(3) of the present Act, and the concluding words of the subsection viz. “due regard being had to the suitability of the materials used and the works carried out and their age, depreciation and obsolescence”, words which are new and not to be found in the old law – suggest that the improvements contemplated are something with physical characteristics and that under the new law the court might have been less ready to reject the submission of counsel for the rating authority ([1963] E.A. at p. 340I) that “a survey with consequent beacons was not the type of physical feature which could be described as improvements”.

In the light of these considerations it is in my view by no means certain that the Court of Appeal would have come to the same conclusion under the new law as it did under the old, in finding that the survey and making of roads effected “improvements”, and must be regarded for the purposes of valuation, as if they had not been made. It is, however, their second finding which is more directly in point in the present proceedings, namely:

- “(ii) Whether the premises form one hereditament for rating purposes is a question of fact and the court could not interfere with the judge’s finding on this issue unless he had erred in principle, which the court could not say he had.”

It is, of course, arguable that as the question is one of fact, the decision is not binding in any cases on another court. But in view of the opinion expressed that the trial judge had not erred in principle it is necessary to look a little more closely at the matter. The passage in the judgment of the Court of Appeal in which the question has been considered ([1963] E.A. at p. 343 A-B) has already been cited, and shows clearly that the view of the Court of Appeal on this point was closely bound up with their conclusion that the subdivision amounted to an improvement. At this stage I need only cite one sentence from the passage referred to:

“When he (sic. the valuer) sets out to value the land he must visualise it as unsubdivided, and that leaves him no basis for saying that he will take separately as rateable units all the plots of the subdivision.”

If, as I have found, there is reason to think that under the new law the Court of Appeal would not have held that subdivision is an improvement, it follows that there is equally ground for supposing that it might not have upheld the view of the trial judge that the subdivision must also be ignored in determining the size of the rateable unit or hereditament.

For all these reasons I am of the opinion that the *Nyali* decision (1) must be regarded as a decision on a law that is no longer in force, and as neither binding nor a safe guide on similar questions falling for decision under the existing law

In support of his submission that under the present law the proper unit of valuation is the subdivision and not the unsubdivided plot, counsel for the appellant relies strongly on s. 4(1)(c) of the Act, referring to the valuation of property which is subdivided or consolidated. He argues with some force that if subdivision is to be ignored, it is pointless to revalue the land which has been subdivided. The only difficulty in acceding to this argument is that under the

old law the same inference would have arisen from a consideration of s. 13(c). It appears, however, that this provision was never brought to the notice of the Court of Appeal. Counsel argues that under the old law all that was required of the valuer was to divide the assessment according to the number of units; but it seems clear that a revaluation had to be made – unless some distinction can be drawn between “a valuation” under para. (c) of s. 13 and “a fresh valuation” under para. (d). But whatever may have been the correct construction of s. 13(c) of the old law, the court is now concerned with the construction of the law as it stands, and in my view the natural inference from s. 4(1)(c) is that, just as one rateable unit comes into being when two or more plots are consolidated, so where there is a subdivision each subdivided part is to be valued as an individual unit. The only ground for reaching an opposite conclusion would be if the trial judge in the *Nyali* case (1) was right in his view (see [1963] E.A. at p. 342 H) that subdivision “only made it practicable for the land to be divided and that it was not divided in law until legal steps of registration were taken, and while it was undivided it was one hereditament”. But the Court of Appeal rejected registration as a firm or rigid guide (see [1963] E.A. at p. 342D), and, with respect to the learned judge it is difficult to understand how land can be referred to in the Act as subdivided if in law it is to be treated as not subdivided. It was accepted in the *Nyali* case (1) that the subdivision was “complete and operative and would justify separate valuation of the plots in a case of compulsory acquisition” (see [1963] E.A. at p. 339); and if it was complete and operative for one purpose, it would appear to create unnecessary complications if it must be regarded as incomplete and inoperative for another. In the *Maori Trustee* case (2), supra, which the Court of Appeal regarded as not entirely irrelevant in the contest of rating (see [1963] E.A. at p. 340B), the New Zealand Court of Appeal had held that:

“it is lawfully open to award compensation upon the basis of a sale to several purchasers in lots according to a subdivision, but only if in fact there is such a subdivision as would permit of this course being adopted at the relevant date.”

The Privy Council saw no reason to disagree with this view, and stated ([1958] 3 All E.R. at p. 341):

“the crucial and deciding factor in their Lordship’s view is a subdivision in fact which has been lawfully carried out.”

It is true that later in his judgment in the *Nyali* case (1) the learned judge of appeal found that no assistance was to be drawn in that case from what was decided in the *Maori Trustee* case (2) (see [1963] E.A. at p. 343G), but his reason for this view, as appears from the context, was “the injunction implicit in the definitions of ‘improvements’ and ‘unimproved property’” under the old law which enjoined the valuer to treat the actual subdivision and roads as if they had not been made. That law no longer applies and for the reasons which I have endeavoured to express, the new law does not require that subdivision should be regarded as an improvement and treated as if it had never been made.

It is interesting to note that when the Bill for the present Act was first published, the provision under consideration read as follows:

“4(1). It shall be lawful for a local authority . . . from time to time and at any time – . . .

- (c) where any rateable property is subdivided or consolidated with other rateable property after it had been entered in a valuation roll, to cause a fresh valuation to be made of the several rateable properties created by the subdivision, or of the rateable property created by the consolidation, as the

case may be, and to cause the appropriate entries to be made in a supplementary valuation roll as hereinafter provided.”

According to the Report of the Select Committee, which was adopted by the Legislative Council, “a redraft of the clause submitted by the Association of Municipalities was considered and adopted as more clearly setting out the requirements of this clause.” There is no indication that in adopting a tidier version of the clause as a whole, either the Select Committee or the legislature intended to make any alteration in its legal effect. It would be wrong, however, to lay too much emphasis on this aspect of the matter, in view of the rule that the parliamentary history of an enactment is not admissible to explain its meaning: see Maxwell on Interpretation of Statutes (11th Edn., p. 26). But it is legitimate to remark that there appears to be no inherent contradiction between the more succinct language of the section and the more explicit terms of the clause as originally published.

If I am right in holding that under the existing law, subdivision is not to be disregarded, at any rate for the purpose of determining the size of the rateable unit, and in my interpretation of s. 4(1)(c), that is sufficient to decide the issue in favour of the appellant, and it is unnecessary to consider in any detail certain other arguments which have been put forward in support of the appeal. I should, perhaps, mention the argument that subdivision is a restriction, in the sense that once a subdivision has been made it is binding on the owner who can only sell his property in accordance with the subdivision. If that is right, the valuer is bound to have regard to subdivision in assessing the value of land and the value of unimproved land by virtue of the latter parts of sub-ss. (1) and (2) of s. 9 of the Act. I am not wholly convinced by the contention that subdivision is a restriction, and am inclined to think that the restrictions primarily intended are those imposed by building by-laws and the demarcation of zones under town planning powers. But even if subdivision is a restriction within the meaning of the two subsections, it does not follow that it must for that reason be taken into account in determining the size of the rateable unit. Section 9 is concerned with the ascertainment of value, and counsel for the appellant has insisted throughout his argument that the basis of valuation is one question, and the determination of the size of the rateable unit is another. I accordingly prefer to base my decision on the grounds I have already stated, namely, that subdivision is under the present law not to be regarded as an improvement, and that s. 4(1)(c) requires the subdivided plot to be taken as the rateable unit, and I do not find it necessary or appropriate to seek further support for these propositions in the references to restrictions in s. 9.

For the above reasons I allow the appeal, set aside, the valuation of the Valuation Committee, and restore the valuation appearing against each plot in the Second Draft Valuation Roll, 1962, as set out in the schedule to the Memorandum of Appeal. The respondent must pay the costs of the appeal.

Appeal allowed. Order accordingly.

For the appellant:

P. A. Clarke, Nairobi

For the respondent:

The Attorney-General, Kenya

A. A. Mulla (State Attorney, Kenya)

Asoni Wanila and others v Uganda

[1966] 1 EA 66 (CAK)

Division: Court of Appeal at Kampala
Date of judgment: 15 January 1966
Case Number: 142/1965
Before: Sir Samuel Quashie-Idun P, Sir Clement de Lestang and Law JJA
Sourced by: LawAfrica
Appeal from: The High Court of Uganda – Fuad, J.

[1] Criminal law – Evidence – Confession – Statement to police – Trial within trial – Evidence given on oath repudiating statement – Ruling that statement admissible – Trial continued – Unsworn statement made by accused denying killing but statement not specifically repudiated – Assessors directed that statement neither repudiated nor retracted – Misdirection.

[2] Criminal law – Evidence – Confession by co-accused – Retraction of confession – Consideration of retracted confession affecting other co-accused – Retracted confession taken into consideration in convicting co-accused.

Editor's Summary

The three appellants were convicted of murder and their appeals were dismissed. During the trial objection was taken to the admissibility of a confession statement made by the second appellant to the police implicating both himself and the other two appellants and in the course of the resulting “trial within trial” the second appellant gave evidence on oath repudiating the statement. The trial judge admitted the statement and the trial continued. In an unsworn statement in his defence, the second appellant denied killing the deceased but did not specifically repudiate his statement in the presence of the assessors. The assessors were told by the judge that the second appellant had neither retracted nor repudiated his confession and held that as the repudiation was not repeated before the assessors it could not be said that the confession was repudiated or retracted. There was evidence that the first appellant had prior knowledge of the intention to kill the deceased; that he harboured the murderers after they had committed the murder; that he had offered them a coffee machine when they demanded money and that a blood stained panga was found under the first appellant's bed. As regards the third appellant there was evidence that he and the second appellant came to the first appellant's house on the night of the murder and reported that the work had been done and demanded payment. The third appellant in his extra-judicial statement had tried to establish an alibi but on the evidence before the court this was found to be false. The first and third appellants had also made exculpatory extra-judicial statements which were admitted at the trial and in convicting them, the trial judge took into consideration the second appellant's confession, as he was entitled to do under s. 28 of the Evidence Ordinance. On appeal the principal ground of appeal of the first and second appellants was that the trial judge used the second appellant's confession against them to an undue extent and that if it had been excluded, too little evidence against them would remain to support their conviction.

Held –

- (i) the second appellant's denial, in his unsworn statement in his defence, that he had participated in killing the deceased, amounted by necessary inference in the circumstances of the case, to a retraction or repudiation of his confession and the assessors should have been directed accordingly;
- (ii) no failure of justice had resulted from the misdirection by the judge to the assessors because as a measure of caution he had sought and found independent corroboration of the second appellant's statement;
- (iii) on his own admission the first appellant was closely implicated in the murder of the deceased and there was a strong indication that he had instigated

the murder; accordingly in the circumstances of the cases the trial judge was fully justified in considering the second appellant's retracted confession to remove any slight doubt which might have existed as to the first appellant's guilt and he was properly convicted;

- (iv) as regards the third appellant his false alibi, and his presence together with murderers, and his demand for payment, implicated him deeply, and accordingly consideration was rightly given to the second appellant's retracted confession in deciding the extent of his participation and he was properly convicted.

Appeal dismissed.

Cases referred to in judgment:

- (1) *Kinyori s/o Karuditu v. R.* (1956), 23 E.A.C.A. 480.
- (2) *Kenga s/o Kayaa and Another v. R.* (1943), 10 E.A.C.A. 123.
- (3) *Muthige s/o Mwigai and Others v. R.* (1954), 21 E.A.C.A. 267.

Judgment

Law JA, read the following judgment of the court: The three appellants were convicted of murder in the High Court of Uganda (FUAD, J.) and now appeal against their convictions. The body of a man called Sedulaka Nakabayi was found at Buchambi village on December 19, 1964. He had died as the result of injuries inflicted with great force apparently with pangas, one wound almost severing the head from the torso. He was last seen in the company of the second appellant (Gonyi) on the previous evening. Gonyi was arrested by the Gombolola chief, and as a result of what he told the chief the first appellant (Asoni) was also arrested and his house searched. Under the mattress on Asoni's bed a blood-stained panga was found. Subsequent tests by the Government Chemist gave positive indications of human blood on this panga. The third appellant (Monje) was arrested later, and all three appellants were taken to Mbale police station. On December 20, Gonyi was formally charged with the murder of Sedulaka and cautioned by Detective Sergeant Simiyu and he made a long statement in reply, which amounts to a confession, implicating both himself and the other two appellants. Objection was taken to the admissibility of this statement at the trial, and Gonyi gave evidence on oath, in the course of the resulting "trial within a trial" repudiating the statement, which he said was concocted by Sergeant Simiyu, and which he thumb – printed because he was threatened. The trial judge ruled that the statement was admissible. In an unsworn statement in his defence, Gonyi denied killing the deceased but did not specifically repudiate his extra – judicial statement in the presence of the assessors, nor was Sergeant Simiyu cross-examined in the presence of the assessors as to the circumstances in which the statement was made although defence counsel was reminded of his right to do so by the trial judge in accordance with the procedure laid down in *Kinyori s/o Karuditu v. R.* (1). The trial judge told the assessors that Gonyi has neither retracted nor repudiated his confession, and he held, in his judgment, that as Gonyi did not repeat his repudiation made in the "trial within a trial" before the assessors, he could not be said to have retracted or repudiated his confession and he relied on *Kenga s/o Kayaa and Another v. R.* (2). We consider that Gonyi's denial, in his unsworn statement in his defence, that he had participated in killing the deceased, amounted by necessary inference in the circumstances of this case, to a retraction or repudiation of his confession, and we are of opinion that the assessors should have been directed accordingly. *Kenga's* case (2) is

distinguishable because in that case the appellant had confirmed his confession in sworn evidence before the committing magistrate. However, no failure of justice has in our opinion resulted, as the judge, as a

measure of caution, sought and found independent corroboration of Gonyi's statement in the evidence of the witness Antonina, an obviously truthful witness who was believed by the assessors and the judge. This girl deposed, that on the night that Sedulak was killed, Gonyi and Monje came to Asoni's hut and Monje asked for payment, saying, "we have done the work" or "we have killed the goat", whereupon Asoni said he had no money but offered to give a coffee machine instead. This amply corroborates that part of Gonyi's statement in which he said, after describing the murder of Sedulaka. "Asoni has not given us money, he wanted to give us a machine of coffee but we refused". We are in no doubt that Gonyi was properly convicted and his appeal is accordingly dismissed.

The case against the other two appellants stands on a different footing. Both made exculpatory extra-judicial statements which were admitted at the trial. In convicting them, the trial judge took into consideration Gonyi's confession, as he was entitled to do under s. 28 of the Evidence Ordinance of Uganda. The confession of one accused can only be taken into consideration against a co-accused to supplement evidence which narrowly falls short of the standard of proof requisite for a conviction. It cannot form the basis of the case against the co-accused (*Muthige s/o Mwigai & Others v. R.* (3)). The trial judge carefully directed himself in this respect. The principal ground of appeal of the appellants Asoni and Monje is that the trial judge used Gonyi's confession against them to an undue extent, and that if it is excluded, there remains so little evidence against Asoni and Monje that their convictions cannot be supported. As regards Asoni, the evidence against him, excluding Gonyi's confession, was as follows:

- (a) his own extra-judicial statement in which he admitted prior knowledge of the intended murder, and said that after the murder, Gonyi and others came to his house and reported that they had killed Sedulaka, whereupon Asoni inspected the dead body, entertained the murderers by giving them a hen to eat, and offered them a coffee machine instead of money which they demanded;
- (b) the discovery of a blood-stained panga hidden under Asoni's mattress, and the fact that Asoni gave an untrue explanation to account for the bloodstains; and
- (c) the evidence of Antonina, who was present when Gonyi and Monje came into Asoni's house, and heard Monje demand money for the work that had been done.

On his own admission, Asoni was closely implicated in the murder of Sedulaka. He had prior knowledge of the intention to kill Sedulaka; he harboured the murderers after they had committed the murder, and he offered them a coffee machine when they demanded money. This demand for money is a strong indication that Asoni instigated the murder, and in our opinion the judge was fully justified, in the circumstances of this case, in taking into consideration Gonyi's confession to remove any slight doubt which might have existed as to Asoni's guilt. This confession not only implicated Asoni as the instigator of the murder, but as an active participant; and this is supported by the discovery, under Asoni's mattress, of a panga stained with human blood. We have no doubt that Asoni was properly convicted and his appeal is also dismissed.

As regards Monje, he made an extra-judicial statement to the effect that he was not in Bugisu at the time but in Buganda. This alibi was proved to be untrue by the evidence of Antonina, who saw him come to Asoni's house with Gonyi, after the murder, report that the work had been done, and demand payment. His false alibi, and his presence together with the murderers on the night of the murder, and his demand for payment, implicate him deeply, and we consider

that consideration was rightly given to Gonyi's confession in deciding the extent of his participation. Monje's appeal also fails, and is dismissed.

Appeal dismissed.

For the first and third appellants:

Hunter & Greig, Kampala

O. J. Keeble and *P. Pal*

For the second appellant:

S. V. Pandit, Kampala

S. V. Pandit

For the respondent:

The Attorney-General, Uganda

A. G. Dobhakta (State Attorney, Uganda)

Republic v Kazungu Kombe and another [1966] 1 EA 69 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	4 March 1966
Case Number:	207/1965
Before:	Sir Clement de Lestang Ag VP, Duffus and Law JJA
Sourced by:	LawAfrica
Appeal from:	High Court of Kenya – Chanan Singh, J.

[1] Criminal law – Practice – Irregularity – Breach of Judges rules – Confession statement by co-accused to police – Accused and co-accused in police custody – Statement read to accused in presence of co-accused – Accused illiterate – Statement read at request of accused – Whether statement inadmissible.

Editor's Summary

The two appellants were convicted of murder and the main evidence against them consisted of confessions alleged to have been made by them which they later retracted. When the confession statement made by the first appellant was read to the second appellant, who was illiterate, he said he “wanted to hear it from the person who made it”, whereupon the first appellant was brought in, his statement was read out and after he had confirmed that he had made the statement he was taken away.

Thereupon the second appellant volunteered a statement which was recorded. Rule 8 of the Judges Rules states that the police should not read a statement of a co-accused to another co-accused but should merely give him a copy of such statement. On appeal.

Held – where the accused is literate rule 8 of the Judges Rules should be followed but as the second appellant was illiterate and he had requested that the first appellant be present, the confession statement was admissible in evidence.

Appeal dismissed.

Case referred to in Judgment:

(1) *R. v. Gardner and Hancox* (1915), 11 Cr. App. R. 265.

Judgment

Sir Clement De Lestang Ag VP, read the following judgment of the court: During the night of December 28-29, 1964, the deceased, Ngare Kombe, was brutally murdered in his hut. The appellants were tried jointly with a third man called Katana Kazungu for the murder. Katana was acquitted but the appellants were convicted and appeal against their conviction. The only real evidence against the appellants consists of confessions alleged to have been made by them which they have retracted. In the case of the first appellant there are two such confessions – one made to a third class magistrate Mr. Nganga and another made later to a first class magistrate Mr. Kirui. There is no material difference between them. In the case of the second appellant there

is only one confession made to a police inspector. At the trial the admissibility of the confessions was challenged on the ground that they were not voluntary. Thereupon the learned trial judge held two “trial within a trial” and decided that they had been voluntarily made.

The principal contention in this appeal is that the learned judge erred in admitting the confessions in evidence and, consequently, the circumstances under which the confessions were made must be examined.

As regards the first appellant, he is a brother of the deceased. On January 4, 1965, he and his son Kahindi were arrested and taken to Kilifi Police Station. They were there informed by Inspector Gilbert Ogan, the investigating officer, that they would be charged with the murder of the deceased and cautioned. On the following day they were taken one at a time before a third class magistrate, Mr. Nganga, to whom they made statements which he recorded and they signed. The statement of the first appellant, if true, is a clear confession of guilt. It is to the effect that the deceased was a wizard who had bewitched him with the result that he had become sick, that he had accepted an offer by the second appellant to kill the deceased on payment of shs. 100/- and that he had duly paid him that sum on the day following the murder. The statement of Kahindi was not produced at the trial for the good reason, no doubt, that it was irrelevant and inadmissible since he was not one of the accused. Moreover, it would appear from the evidence that it was neither a confession nor materially different from the evidence which he gave in court namely that on the day following the murder he saw both appellants at the first appellant's house and the first appellant counting money in the presence of the second appellant.

After taking the statements Nganga handed them over to Inspector Gilbert Ogan, but three days later he obtained them back from him on some excuse or other. The first appellant's statement was recovered by the police from Nganga on March 5, 1965, but not the other, and Nganga was subsequently convicted of “wilfully removing statements” and sentenced to eight months in prison. Meanwhile on January 8, 1965, the first appellant was taken before the first class magistrate Mr. Kirui who recorded another statement from him. As we have said before this statement is substantially the same as that taken by Nganga. It was undoubtedly Nganga's behaviour in regard to the statement that led to the second statement being taken from the first appellant. At the trial both magistrates testified that the statements were made voluntarily. Their evidence was supported by that of the interpreter used on each occasion. The first appellant did not give evidence on oath. He made an unsworn statement in which he merely said that he made the statement because he was afraid. He did not allege any ill-treatment, inducement or coercion. It is, however, contended that because of Nganga's conduct and because two statements were taken there must have been some inducement. We are unable to agree. We are satisfied that the learned judge was abundantly justified in coming to the decision that the first appellant's statements were free and voluntary.

It was also contended that the learned judge did not allow the appellants' counsel to address the court on the question of admissibility. This is not quite accurate. What happened was that counsel did not address the court and the learned judge wrote down a ruling which he read, thereupon counsel asked to be heard and the learned judge pointed out that no law was involved in the matter and counsel did not press the point. Counsel, however, did address the court on this matter at the conclusion of the evidence and we can see no merit in this criticism of the learned judge.

As regards the second appellant he also is a relation of the deceased. He was arrested on January 6, 1965, and charged with the murder by Inspector Gilbert Ogan on January 7, 1965. He made a statement denying the charge. On January 7

Inspector Dibb visited Kilifi Police Station. He obtained from Inspector Gilbert Ogan the statements which the first appellant and Kahindi had made to Mr. Nganga and read them out to the second appellant. The appellant said that "he had heard it but he wanted to hear it from the person who had made it." Whereupon the first appellant was brought in, his statement was read out and after he had confirmed that he had made the statement he was taken away. Thereupon the second appellant said "I want to tell you about this". Inspector Dibb then cautioned him and the appellant volunteered a statement which the Inspector recorded, read over to the appellant who signed it. It would appear that the appellant was subsequently taken before Mr. Kirui the first class magistrate who also recorded a statement from him. That statement was not produced at the trial and although the second appellant's counsel knew of its existence he did not seek its production.

At the trial within a trial which was held to determine the admissibility of the confession of the second appellant Inspector Dibb and Inspector Gilbert Ogan testified that no pressure of any kind was brought to bear upon the appellant to confess and the appellant himself said nothing and called no witness. In his evidence, however, at the end of the trial he made an unsworn statement in which he said that he was forced and made the statement through fear.

Like the learned trial judge we do not consider that the failure of Inspector Dibb to observe rule 8 of the judges rules strictly necessarily renders the confession inadmissible. Rule 8 states that the police should not read the statement of a co-accused to another co-accused but merely give him a copy of such statement. Where the accused is literate this rule should of course be followed but where as in this case the second appellant is illiterate we do not see how else he could be apprised of the statement of his co-accused. What has caused us some concern in this case is the reading of the first appellant's confession to the second appellant in the former's presence. Such a practice was condemned in *R. v. Gardner & Hancox* (1) and we too disapprove of it entirely. If we were satisfied that that course was taken in order to elicit a confession from the second appellant we would not hesitate to hold that the confession should not have been admitted in evidence. It so happens however, that the confrontation in the present case was at the request of the second appellant and the learned judge was satisfied that it was not reprehensible in the circumstances. We are not prepared to disagree.

Before leaving this aspect of the case we wish to refer to the non production of the second appellant's statement to Mr. Kirui. We cannot understand why that statement was not produced at the trial. It was clearly the duty of the prosecutor to do so or to explain why it was not done. We have considered whether this omission may not have occasioned a failure of justice but think not, because the appellant's counsel knew of it and we cannot believe that if it was favourable to his client he would not have sought to have it produced.

The last ground of appeal is that there was no sufficient corroboration of the confessions which were retracted. It is true that some of the matters which the learned judge treated as corroboration do not amount to corroboration but it is equally clear that there was corroboration, in particular, the evidence of Kahindi which the learned judge believed. The learned judge was satisfied that the confessions were true and it seems to us that the confessions themselves and all the surrounding circumstances support this finding. The appeal therefore fails and it is dismissed.

Appeal dismissed.

For the appellant:

Zaher Ahmed & Co., Nairobi

Zaher K. Ahmed

For the respondent:

The Attorney-General, Kenya

J. A. Khaminwa (State Attorney, Kenya)

Lowis George Maxim Vidot v Babu Ram Sharma
[1966] 1 EA 72 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	17 May 1965
Case Number:	594/1963
Before:	Harris J
Sourced by:	LawAfrica

[1] Mortgage – Enforcement of security – Mortgage incorporating power of sale without intervention of court – Action seeking judgment for principal sum and interest, order for sale, leave to bid at auction and personal decree for any deficiency after sale of mortgaged property – Statute providing costs of action to be paid by mortgagee unless special reason shown – Whether mortgagee entitled to personal decree and costs of suit – Indian Transfer of Property Act, 1882, s. 67 and s. 69.

[2] Costs – Mortgage suit – Mortgage incorporating power of sale – Action seeking judgment for principal amount and interest, order for sale, leave to bid at auction and personal decree for any deficiency after sale of mortgaged property – Statute providing costs of action to be paid by mortgagee unless special reason shown – Whether mortgagee entitled to costs of the suit – Indian Transfer of Property Act, 1882, s. 67 and s. 69.

Editor's Summary

The defendant had mortgaged his property to the plaintiff to secure repayment with interest of the principal sum of Shs. 40,000/- lent by the plaintiff to the defendant. The deed of mortgage incorporated the power of sale without the intervention of the court under s. 69(1) of the Indian Transfer of Property Act, 1882. The defendant defaulted and the plaintiff filed an action claiming judgment for the principal amount and arrears of interest, an order for sale of the mortgaged property, an order for a personal decree against the defendant for any deficiency after sale of the mortgaged property and costs of the action. For the defendant it was contended that the plaintiff was not entitled to an order for a personal decree until the result of the sale of the mortgage property was known nor to the costs of the action by virtue of the provisions of s. 67 of the Act. For the plaintiff it was submitted that the filing of the action in spite of the power of sale in the mortgage deed was necessary because otherwise he could not have obtained leave of the court to bid at the auction nor a personal decree against the defendant for any deficiency, and therefore he had shown “special reason to the contrary” why he should not be deprived the costs of the suit.

Held –

- (i) in view of the provisions of O.2 r. 1 of the Civil Procedure (Revised) Rules 1948 it was desirable that the plaintiff should have leave, in the event of the sale of the mortgaged property not yielding sufficient sum to enable the plaintiff's claim to be met in full, to apply to the court for the issue of a personal decree against the defendant for any deficiency;
- (ii) there is nothing in the Indian Transfer of Property Act, 1882 to suggest that where the power of sale conferred by s. 69 is not adequate to meet the reasonable requirements of the mortgagee desiring to realise his security and obtain repayment of his debt by sale of the property the mortgagee is to be deprived of his right to come to court for assistance save at his own expense, or that his position is to be in any other way worsened as compared with the position existing prior to the Act;
- (iii) where the court is satisfied that, despite the provisions of the s. 69, a mortgagee, wishing to exercise his power of sale, is unable to obtain the best price without first obtaining an order for sale from the court, the court may properly regard the case as one where, generally speaking and in the absence

of some exceptional circumstances, there exists a special reason within the meaning of s. 67, for deciding to order that the costs of the suit, should be paid by the mortgagee;

- (iv) in the circumstances of the case the plaintiff was fully justified in seeking the assistance of the court and accordingly he was entitled to the costs of the suit.

Judgment for the plaintiff as prayed.

Cases referred to in judgment:

- (1) *D'Souza v. Patel and Others*, Kenya Supreme Court Civil Case No. 1906 of 1961 (O.S.) (unreported).
(2) *Farrar v. Farrars Ltd.* (1889), 40 Ch.D. 395.

Judgment

Harris J: By an indenture of mortgage dated December 31, 1959 and made between the defendant as mortgagor and the plaintiff as mortgagee in fee simple certain premises at Eastleigh, Nairobi, to which I will refer as the mortgaged property, subject to a proviso for redemption. The purpose of the transaction was to secure the repayment with interest of a principal sum of Shs. 40,000/- lent by the mortgagee to the mortgagor, the date for repayment of which was stated in the mortgage to be June 30, 1960, and the interest thereon was to be payable quarterly. The mortgage provided that the mortgagor should keep the buildings on the premises in good and substantial repair and condition and keep them insured against loss or damage by fire to the full insurable value thereof, in default of which the mortgagee should be entitled to demand forth-with repayment of all moneys due on the security of the mortgage. In addition the mortgage provided that in the event of the mortgagee desiring for any reason other than such default to call in the said principal sum on or at any time after June 30, 1960 the mortgagee should give to the mortgagor three calendar months previous notice in writing of his intention in that behalf.

On July 19, 1962 the mortgagee served a notice in writing on the mortgagor calling upon him to repay the balance of the said principal sum by October 31, 1962, but the mortgagor failed to make such repayment. In addition, the mortgagor subsequently fell into arrear in the payment of the interest becoming due on April 1, 1963 and July 1, 1963, and failed or neglected to keep the buildings in good and substantial repair and insured against loss or damage by fire in accordance with his covenant.

On July 3, 1963, the mortgagee filed the present suit, setting out in his averments the matters referred to above, and claiming, in his plaint as amended at the hearing, relief to the following effect: –

- (a) judgment for Shs. 40,114/- being the sum of Shs. 39,000/- balance of the said principal sum and the sum of Shs. 1,114/- being interest due on April 1, 1963, and July 1, 1963, with further interest on the said sum of Shs. 39,000/- at the rate of ten per centum per annum from October 1, 1963 until payment in full, together with interest thereon at the court rate;
- (b) an order for payment of the said sum of Shs. 40,114/- together with further interest and costs (as certified by the registrar on the taking of accounts on or before a date to be fixed by the court;
- (c) an order that, in default of payment of the moneys mentioned in (b), the mortgaged property be directed to be sold by public auction and the proceeds thereof applied, first, in or towards the costs and charges incurred for the sale; secondly, towards payment of amounts due to

- the plaintiff for principal, interest and costs as aforesaid; and, thirdly, by the payment of the balance (if any) into court;
- (d) an order that, if the proceeds of the sale should be insufficient to discharge in full the amounts due to the plaintiff for principal, interest and costs as aforesaid, the plaintiff should be at liberty to apply for a personal decree against the defendant for any deficiency, together with interest and further costs, and that for this purpose all necessary directions be given by the court;
 - (e) an order granting to the plaintiff leave to bid at the sale of the mortgaged property; and
 - (f) further or other relief.

The defendant in his defence as filed did not seek to traverse any of the averments in the plaint, each of which therefore must be taken to be admitted, but he contended that the plaintiff's case was misconceived in law inasmuch as the mortgage "reserves the power of sale in the plaintiff under s. 69 of the Transfer of Property Act . . . and a resort to court action is unnecessary," that accordingly the plaintiff was not entitled to any of the reliefs claimed, that no costs should be allowed to him, and that the plaintiff should be ordered to pay the costs of the defendant.

At the hearing counsel for the defendant very properly conceded that the defence was too widely framed and he sought and obtained leave to so amend his pleading as to challenge only the plaintiff's claim for the relief set out at (d) above and the claim for costs. In the result these two issues alone arise for determination and the plaintiff is entitled to succeed with regard to the remainder of his claim.

The plaintiff called as a witness Mr. C. B. Mistri, a court broker and auctioneer of many years standing, who stated that he was familiar with the selling of houses and premises in the area of Nairobi in which the mortgaged property is situate, that he inspected the mortgaged property within the past few days, that it is badly situated from the point of view of selling, and that on a sale in the open market the price likely to be obtained would not, in his opinion exceed, at the most, a sum of Shs. 20,000/-. His evidence was not shaken on cross-examination, and he stated in reply to a question put to him by me, that court sales of property usually fetch better prices than sales by mortgagees out of court because the potential purchasers feel that they get a better title on a court sale and bid more freely. No evidence was called on behalf of the defendant.

In the light of the pleadings and other papers on the court file and of the evidence tendered I find as a fact

- (i) that the plaintiff gave due notice to the defendant to repay the principal sum of Shs. 39,000/- on or before October 31, 1962;
- (ii) that the defendant has failed to make any payment in response to this demand;
- (iii) that a sale of the mortgaged property will be unlikely to produce more than one-half of this amount but that such a sale might be expected to yield a somewhat better purchase price if it were by public auction under a court order;
- (iv) that in addition to the said sum of Shs. 39,000/- there are considerable further monies due by the defendant to the plaintiff by way of interest;
- (v) that the only means whereby under the mortgage deed the plaintiff can seek to recover from the defendant the shortfall which is very likely to arise on the sale will be by a personal decree against the defendant;
- (vi) that the defendant resides in Uganda and that it took eleven months to effect service of the plaint upon him; and

- (vii) that the defendant has defaulted, not only in failing to repay the principal sum of Shs. 39,000/-, but also in regard to his payments of interest, his care and maintenance of the mortgaged property and his upkeep of the insurance against fire.

The first question for determination as to whether the plaintiff should at this stage be given leave, in the event of the sale of the mortgaged property not yielding a sufficient sum to enable the plaintiff's claim to be met in full, to apply to this court for the issue of a personal decree against the defendant for the amount of the deficiency. Counsel for the defendant contended that it would be premature to give leave until the result of the sale is known and that Mr. Mistri's evidence as to the price likely to be obtained was pure conjecture. In my opinion it is clear that, since the plaintiff has become entitled through the default of the defendant to come to court and obtain an order for sale (with or without an order for costs as I shall decide later in this judgment), it is not merely permissible but is desirable that the plaintiff should at this stage make any claim that he may wish to bring forward for leave to apply, if and when it should become necessary, for the issue of a personal decree against the defendant. For the plaintiff to defer making such claim and bring it forward later would be contrary to the intendment, if not indeed to the express provisions, of O. II r. 1 of the Civil Procedure (Revised) Rules, 1948, requiring that every suit shall include the whole of the claim which the plaintiff is entitled to make, that where a plaintiff omits to sue in respect of any portion of his claim he shall not afterwards sue in respect of that portion, and that where a person entitled to more than one relief in respect of the same cause of action omits, except with leave of the court, to sue for all such reliefs he shall not afterwards sue for any relief so omitted.

I now come to the second and more important question raised by the defence, namely, as to whether, having regard to the present provisions of s. 67 of the Transfer of Property Act, 1882 (of India), as applied to Kenya the plaintiff should not be left to pay his own costs of this action and be compelled to pay those of the defendant. In view of the seriousness of this matter to all mortgagees and chargees of land, and of the fact that the relevant provisions of the section became law as a result of an amendment made in Kenya some six years ago, it is remarkable that, as I was informed from the Bar, there is no reported decision as to the scope and effect of those provisions although the matter is said to have come up for consideration on several occasions.

By s. 10 of what was then known as the Indian Transfer of Property Act (Amendment) Ordinance, 1959, s. 67 of the Act of 1882 was amended by the insertion therein of a third paragraph reading:

"Whenever a mortgagee under an English mortgage or a chargee under a charge executed in accordance with the provisions of s. 46 of the Registration of Titles Ordinance institutes a suit for the sale of the mortgaged property, the Court shall inquire whether such suit has been brought by reason only of the fact that the mortgage instrument was not attested and did not bear a certificate as required by sub-s. (4) of s. 69 of this Act, or whether such mortgagee or chargee is entitled, or may by giving notice under para. (a) of s. 69A of this Act become entitled, to exercise the mortgagee's statutory power of sale, and, if it appears to the Court that the suit was brought for the reason aforesaid or that the mortgagee or chargee was so entitled, the Court shall, unless it sees special reason to the contrary, order that all the costs of the suit, including such costs as may properly be incurred between the order for sale and the time of actual payment, shall be paid by the mortgagee or chargee."

The mortgage with which we are concerned being what is described in the Act of 1882 as an English mortgage, I made, at an early stage of the proceedings, the

inquiry required by that paragraph and I was informed by counsel for the plaintiff that the plaintiff, as mortgagee, was indeed entitled to exercise his statutory power of sale but that nevertheless it would be his submission that, for special reasons to be given, the court should not order that the costs of the suit be borne by the mortgagee but should in lieu thereof be awarded to him.

In so stating that the mortgagee was entitled to exercise his statutory power of sale counsel was, no doubt, referring, quite correctly, to the power of sale conferred by sub-s. (1) of the new s. 69 of the Act and which also derives from the Ordinance of 1959. This subsection is in the following terms:

“A mortgagee, or any person acting on his behalf where the mortgage is an English mortgage, to which this section applies, shall, by virtue of this Act and without the intervention of the Court, have power when the mortgage-money has become due, subject to the provisions of this section, to sell, or to concur with any other person in selling, the mortgaged property or any part thereof, either subject to prior encumbrances or not, and either together or in lots, by public auction or by private contract, subject to such conditions respecting title, or evidence of title, or other matter, as the mortgagee thinks fit, with power to vary any contract for sale, and to buy in at an auction, or to rescind any contract for sale, and to resell, without being answerable for any loss occasioned thereby; the power of sale aforesaid is in this Act referred to as the mortgagee’s statutory power of sale and for the purposes of this Act the mortgage-money shall be deemed to become due whenever either the day fixed for repayment thereof, or part thereof, by the mortgage instrument has passed or some event has occurred which, according to the terms of the mortgage instrument, renders the mortgage-money, or part thereof, immediately due and payable.”

It will be observed that among the powers which this subsection confers upon a mortgagee selling without the intervention of the court is a power to sell the mortgaged property by public auction and “to buy in” at that auction. In the case of *D’Souza v. Patel and Others* (1), Rudd, J., held that this provision enabled the mortgagee merely to buy back for the owner, that is, the mortgagor, and did not empower the court to give leave to the mortgagee to bid on his own behalf at the auction, and he further held that such leave can in general be given only where the sale is by the court. This decision, which was relied upon by both parties in their arguments before me though for different purposes, is supported by the passage in Fisher and Lightwood’s *Law of Mortgage* (7th Edn.), at p. 410, to the effect that a mortgagee cannot sell to himself either alone or with others, nor to a trustee for himself, unless the sale is made by the court and he has obtained leave to bid, and it must be remembered that the learned editor was there dealing with the law of England subsequent to the Law of Property Act, 1925, which, by s. 101(1)(i) provides that a mortgagee, where the mortgage is by deed, shall, by virtue of the Act, have to the same extent as if the power had been in terms conferred by the deed, a power inter alia to sell the mortgaged property by public auction and to buy in at the auction. For present purposes, therefore, the position must be taken to be that, although the plaintiff here requires no assistance from this court for the purpose of selling the mortgaged property by means of a public auction, the right to bid for and to buy in the property on his own behalf at that auction can be conferred only by the court and then only if the court has itself ordered the sale.

Counsel for the defendant, as I have already mentioned agreed during the argument, and I think rightly, that the circumstances of the case are such that the plaintiff should have leave to bid at the auction and, if his bid be successful, to buy in the property on his own behalf, and I shall so order. This direction, therefore, will constitute “the express permission of the court” referred to in

the fifth paragraph of the prescribed form of Notification of Sale set out as form 1 in the Schedule to the Transfer of Property (Mortgage Suits) Rules.

We are therefore left with the principal issue between the parties, which is as to whether there exists some special reason, within the meaning of s. 67 of the Act of 1882, why I should not order that all the costs of this suit, including such costs as may properly be incurred between the order for sale and the time of actual payment, shall be paid by the plaintiff. It will be appreciated that the terms of this section impinge upon the discretion as to costs allowed to the court by s. 27(1) of the Civil Procedure Act and it is necessary to determine what is meant in the section by the words “special reason to the contrary”.

Counsel for the plaintiff submitted that the evidence showed that it will be clearly impossible to obtain on a sale of the property a price which will come anywhere near to the amount now due to the plaintiff; that the plaintiff will therefore have to fall back on his right to a personal decree against the defendant; that the latter resides in Uganda and may not have any assets within the jurisdiction; that if the plaintiff were to exercise his power of sale under s. 67 without an order of the court he would be precluded from buying in the property which would then pass away to the purchaser leaving the plaintiff with no security and very little hope of recovering the balance of his debt; and that, as the mortgagor is still in possession of the property, a purchaser from the mortgagee in a sale out of court might well find it difficult to obtain possession; and he referred to the foregoing decision of Rudd, J., to 27 Halsbury's Laws (3rd Edn.) at p. 307, and to the judgment of Lindley, L.J., in *Farrar v. Farrars Ltd.* (2) (40 Ch.D. at p. 409). In addition, he pointed out that the witness, Mistri, had stated that, in his opinion, court sales usually fetch higher prices than sales by mortgagees.

Counsel for the defendant, while agreeing that the plaintiff would require an order of the court to enable him to bid at the auction, contended that the purpose of s. 10 of the Ordinance of 1959, inserting the new paragraph in s. 67 of the Act of 1882, was to ensure that mortgagors should not be unnecessarily burdened with costs; that it must be presumed that when the Legislature was enacting s. 10 it was aware of the fact that a mortgagee, exercising his statutory power of sale, is not permitted to bid on his own behalf and that the desirability of his being enabled to bid by means of a court order cannot be a “special reason” for allowing him costs; that the evidence produced by the plaintiff was of little value and very largely conjectural; that the court would be presupposing too much if it were to accept the evidence that the property will not realise more than Shs. 20,000/- and that the possibility of that occurring would not constitute a “special reason” for allowing costs; and that, even if there should be a short-fall on the sale, the mortgagee can still rely on obtaining a personal decree. A “special reason” for allowing a mortgagee his costs would, he argued, include a denial by the mortgagor of the mortgage debt or a challenge to the effectiveness of the statutory certificate on the mortgage deed, but not an anticipated insufficiency in the proceeds of sale of the property.

I venture to suggest that the construction of the new s. 67 of the Act should be approached by a consideration of the pre-existing rights of mortgagors and mortgagees inter se and of the amendments sought to be effected to those rights and to the Act of 1882 as a whole by the Ordinance of 1959. Generally speaking a mortgagee is entitled to be indemnified out of the mortgaged property in regard to all legal and other expenses properly and reasonably incurred by him in realising his security and to have such expenses added to the amount of the mortgage debt. I cannot see anything in the Ordinance of 1959 which conflicts with this principle. The new s. 69, which is imported into the Act by s. 13 of the Ordinance, confers upon mortgagees the extremely wide and valuable power, when the mortgage money has become due, of selling the mortgaged property without the intervention of the court, with an

exhaustive range of ancillary

powers as to the manner of sale, thereby considerably improving upon the pre-existing position of the mortgagee and affording recognition, it may be, of the great and increasing importance to be attached to the modern mortgage as a means of investment and of providing capital for commercial purposes. The insertion in s. 67 of the Act of the third paragraph, which has been effected by s. 10 of the Ordinance, though occurring prior in the Act to s. 69, is in reality a corollary to that section and serves the very useful purpose of encouraging mortgagees, who are desirous of selling the mortgaged property, of relying upon their newly-conferred powers under s. 69 instead of, as hitherto, obtaining leave of the court to sell, and, as a sanction, it imposes upon mortgagees who insist on obtaining leave of the court the burden of either being required to pay the costs of the court proceedings (including the mortgagors' costs) or satisfying the court that there exists some "special reason" why they should not be required to pay such costs. It is reasonable to suppose, therefore, that in all cases where s. 69 confers sufficient power upon a mortgagee to sell the mortgaged property for the purpose of realising his security and obtaining repayment of the mortgage debt the costs involved in an unnecessary resort to court proceedings will fall in their entirety upon the mortgagee.

But there appears to be nothing in the Ordinance to suggest that where the power of sale conferred by s. 69 is not adequate to meet the reasonable requirements of a mortgagee desiring to realise his security and obtain repayment of his debt by sale of the property the mortgagee is to be deprived of his right to come to court for assistance save at his own expense, or that his position is to be in any other way worsened as compared with the position existing immediately prior to the Ordinance. And it must be remembered that to worsen the position of a mortgagee in regard to effecting a satisfactory sale of the property usually is to worsen the position of the mortgagor also for he is no less interested in the obtaining of the highest possible price than is the mortgagee since the higher the price realised the lesser is the amount of the mortgage debt for which the mortgagor may be made liable on a personal decree under his covenant to pay the debt.

For these reasons I am of the opinion that where the court is satisfied in any particular case that, despite the provisions of the new s. 69 of the Act of 1882, a mortgagee who is entitled to realise his security by sale of the property, is unable to do so to the best advantage in regard to price without first obtaining an order for sale from the court, the court may properly regard the case as one where, generally speaking and in the absence of some exceptional circumstance, there exists a special reason, within the meaning of s. 67, for declining to order that the costs of the suit, including such costs as may properly be incurred between the order for sale and the time of actual payment, should be paid by the mortgagee.

In the present case I am satisfied that there will almost certainly be a substantial shortfall however the sale is conducted and that it is in the interest of both parties that every effort should be made to ensure that the highest possible price is obtained; that a sale by order of the court is likely to produce a better price than a sale by the mortgagee under his statutory powers; that it would be unreasonable to deny to the mortgagee the right to bid for and buy in the property on his own behalf, the exercise of which right, by the bringing in of one more potential purchaser, may itself lead to an enhanced purchase price; that such right can be conferred only by an order of this Court; and that accordingly the mortgagee was fully justified in seeking the assistance of the court.

For these reasons there will be judgment for the plaintiff as prayed and I shall declare the plaintiff entitled to his costs, charges and expenses of and in

relation to this suit and the proceedings thereunder to be added to his demand and included in the mortgage debt. The defendant will abide his own costs.

Judgment for the plaintiff as prayed.

For the plaintiff:

D. V. Kapila, Nairobi

For the defendant:

S. P. Vaid, Nairobi

Nasser Mohamed Omer v Prudential Assurance Co Ltd
[1966] 1 EA 79 (CAN)

Division:	Court of Appeal at Nairobi
Date of ruling:	22 March 1966
Case Number:	55/1965
Before:	Newbold Ag VP, Duffus and Spry JJA
Appeal from:	The Supreme Court of Aden – Goudie, J

[1] Insurance – Motor insurance – Policy providing indemnity for accidental collision – Employee deliberately drove car into sea – Car recovered from sea – Car damaged because of immersion in salt water – Whether loss of car due to “accidental collision” – Definition of “collision”.

Editor’s Summary

The appellant claimed that he was entitled to an indemnity from the respondent company against the loss of his motor car, which the trial judge indicated had been driven deliberately into the sea by an employee of the appellant. The insurance policy provided that the respondent would indemnify the appellant against loss or damage to the motor vehicle by accidental collision. The basis of the appellant’s claim was that the car accidentally went into the sea and was damaged. It was common ground that the driver was acting in the course of his employment. The trial judge dismissed the suit on the ground that the appellant had failed to prove that the loss or damage was due to accidental collision. On appeal it was argued that there had been a collision, that it had been accidental, and that the damage the car suffered from immersion in salt water was a direct result of the collision.

Held –

- (i) the entry of the car into the sea was not an “accidental collision” and accordingly under the terms of the policy the appellant was not entitled to claim any indemnity for the loss of the car;
- (ii) the entry of the car into the sea was not accidental as it had been driven deliberately by the

employee of the appellant into the sea and the act of the employee must be regarded as the act of the appellant, even though the appellant had no knowledge of it.

Per Spry, J.: “a collision” is an impact importing at least some degree of violence.

Per Newbold, P.: “an accident” is an occurrence which, in relation to the insured, is neither intended nor expected nor so probable a result of a deliberate act that the result must have been foreseen as a probable consequence of the act.

Per Duffus, J.A.: “accidental collision” does not include a collision which happens as a result of an act intentionally designed to cause a collision for the purpose of damaging the vehicle.

Appeal dismissed.

Cases referred to in judgment:

- (1) *Midland Insurance Co. v. Smith* (1881), 6 Q.B.D. 561.
- (2) *Trim Joint District School Board of Management v. Kelly*, [1914] A.C. 667.
- (3) *Lloyd v. Grace, Smith & Co.*, [1912] A.C. 716.
- (4) *Kisumu Trading Stores v. K. B. Shah* (1965), 315 (C.A.).
- (5) *Barwick v. English Joint Stock Bank*, [1867] L.R. 2 Ex. 259.
- (6) *Houldsworth v. City of Glasgow Bank* (1880), 5 App. Cas. 317.
- (7) *Union Marine Insurance Co. v. Borwick*, [1895] 2 Q.B. 279.
- (8) *Mancomunidad del Vapor Frumiz v. Royal Exchange Assurance*, [1927] 1 K.B. 567.
- (9) *The Normandy*, [1904] P. 187.
- (10) *Chandler v. Blogg*, [1898] 1 Q.B. 32.
- (11) *Reischer v. Borwick*, [1894] 2 Q.B. 548.
- (12) *Heskell v. Continental Express Ltd.*, [1950] 1 All E.R. 1033.
- (13) *Jupiter General Insurance Co. Ltd. v. Rajabali Hasham & Sons*, [1960] E.A. 592 (C.A.).
- (14) *Re Etherington and the Lancashire and Yorkshire Accident Insurance Co.*, [1909] 1 K.B. 591.
- (15) *Fenton v. Thorley & Co. Ltd.*, [1903] A.C. 443.

The following judgments were read.

Judgment

Spry JA: The primary facts out of which these proceedings arose are not in dispute. The appellant was the owner of an Opel motor car, registered under number L 2651. This vehicle was usually driven by an employee of the appellant, one Mohsin Ali Saleh, and was being driven by him in the course of his employment on the evening of December 3, 1962. At about 9.30 or 10 p.m., Mohsin drove the car off the road onto the sea shore. He changed gear to mount the kerb and drove on the sand in low gear (either first or second). The sand was level at first, but then sloped downwards. Mohsin failed to stop the car and drove straight into the sea. It appears that the car was not recovered from the sea for three days, when it was regarded as a write-off.

The car was insured by the appellant with the respondent company and it appears that he reported the loss on the following morning, soon after he himself learned of it. He completed a claim form but eventually, after lengthy investigation, the company repudiated liability. The appellant then sued the company in the Supreme Court of Aden claiming Shs. 11,000/- as the estimated value of the car and Shs. 10,770/- as consequential loss. The basis of the claim was that the car “accidentally went into the sea on 3.12.62 and was damaged and was a total loss.” The defence was a denial that the car “accidentally went into the sea as alleged or at all”.

Two issues were agreed, the first whether it was proved that the car sustained damage by “accidental

collision” within the meaning of s. 1, para. 1(a) of the policy of insurance and the second, if the answer to the first issue was in the affirmative, what sum the appellant was entitled to recover.

Section 1, para. 1(a) of the policy reads as follows:

- “1. The Company will indemnify the Insured against loss of or damage to the Motor Vehicle and its accessories and spare parts whilst thereon
 - (a) by accidental collision or overturning or collision or overturning consequent upon mechanical breakdown or consequent upon wear and tear.”

The evidence called by the appellant included that of the driver and of a person who was a passenger in the car at the time when it was lost and it was sought to prove that the loss of the car was due to the failure of its brakes. The respondent company called evidence to show that the brakes were examined after the car was recovered from the sea and that they were in reasonably good working order. The cross-examination of the appellant's witnesses was clearly aimed at showing that the loss of the car was deliberately contrived.

The learned trial judge held that to succeed the appellant had to show in the first place that the loss of or damage to the car had been caused by a collision or overturning. He pointed out that there was no evidence to show that the car overturned. He doubted whether the car could be said to have "collided" with the sea but held that it was immaterial as the loss or damage was not the result of the "collision" but of immersion in salt water.

He went on to remark that an attempt had been made at a late stage to base a claim on another sub-paragraph of the policy relating to damage caused "by malicious act" but rejected this as being contrary to the claim in the plaint and to the whole conduct of the appellant's case.

He went on to say that the appellant had failed to satisfy him that the loss or damage was accidental. Having inspected the scene, the learned judge found it "extremely difficult to envisage how the driver in first or second gear could have taken a straight path into the water accidentally. When he released his accelerator his gear would have acted as a brake and he could at least have taken some form of avoiding action even if his brakes failed." He went on to say that he saw no reason to believe that the brakes had failed, as he was satisfied that they were in order immediately after the car was recovered from the sea.

Finally, he held that under the terms of the policy the company was not liable for consequential loss. The memorandum of appeal included an appeal against this finding but it was abandoned at the hearing.

Counsel who appeared for the appellant, argued that there had been a collision, that it had been accidental, and that the damage the car suffered from immersion in salt water was a direct result of the collision and not so remote as to preclude the appellant from succeeding.

He began by dealing with the question whether what had occurred had been accidental. He submitted, in the first place, that the learned judge's remarks (there was no express finding) indicated nothing more at the worst, than gross negligence on the part of the driver of the car. Even, however, if they were to be construed as a finding of wilful misconduct on the part of the driver, that, in counsel's submission, would not prevent the loss being "accidental" in relation to the owner, provided he had not been shown to be party or privy to the act. He relied particularly on *Midland Insurance Co. v. Smith* (1), in support of this submission. It had never been part of the company's case that the appellant had been party or privy to any act of wilful misconduct. He cited also *Trim Joint District School Board of Management v. Kelly* (2) as authority for saying that an act done deliberately may still be an accident in relation to the person who suffers from it.

Counsel for the company took a different view. In his submission, the learned judge's observations could only mean that he believed the driver of the car deliberately drove it into the sea. He argued that if the driver was acting deliberately, but not maliciously towards his employer, he should be deemed to have been acting in the course of his employment in which case his motive would be imputed to his employer.

In the alternative, counsel for the company argued that the word "accidental" has to be read in its

context in the policy and must be given a meaning. He stressed

that while the policy provided for loss by accidental collision or overturning, it provided for loss by fire without any requirement that it be accidental. He pointed out also that under the terms of the policy it is the collision and not the loss that must be accidental. He sought to distinguish *Midland Insurance Co. v. Smith* (1), since the policy in that case was against loss by fire, and did not require the fire to be accidental in origin. The *Trim Joint District School* case (2) was a case under the Workmen's Compensation Acts in which the operative expression was "injury by accident"; the present policy deals with loss by accidental collision, not accidental loss by collision, and Mr. Deverell argued that the distinction is sufficiently real to justify this court following the minority judgments in the *Trim Joint District School* case (2).

For my own part, I entertain no doubt that the remarks of the learned judge amount to a finding that the driver of the car deliberately drove it into the sea. In my opinion, there was evidence on which he could properly come to that finding and I see no reason to interfere with it. There was no finding, and no evidence on which a finding could have been based, as to the reason for this action but certainly it was no part of the appellant's case, nor was there any suggestion in the evidence, that the driver was acting out of malice towards his employer.

Learned counsel were not able to refer us to any authority on the law of master and servant in relation to a situation such as this, nor am I aware of any. It is therefore necessary to go back to basic principles. It is the general rule that a master is liable to a third party for the tortious act of his servant, if that act is done in the course of the servant's employment, even though the tortious act was done without the authority of the master and the master derived no benefit from it. The general authority for this statement is *Lloyd v. Grace, Smith & Co.* (3), which was recently followed by this court in *Kisumu Trading Stores v. Shah* (4).

Logically it would seem, by parity of reasoning, that a master ought not to be able to base a claim against a third party on a tortious act of his servant, acting in the course of his employment. It should be borne in mind that the liability of the master is not based on any imputation of vicarious fraud but simply on the law of agency (*Barwick v. English Joint Stock Bank* (5); *Houldsworth v. City of Glasgow Bank* (6); *Lloyd v. Grace, Smith & Co.* (3)). Here, it seems to me, the act of the servant, if done in the course of his employment, must be regarded as the act of the master. I have no doubt, and indeed it never seems to have been challenged, that the driver, Mohsin, was acting in the course of his employment when he drove onto the sand. He said himself that it was part of his duty to transport labourers coming ashore from dhows and that when awaiting them he used to park the car at this spot. It cannot, in my view, possibly be argued that in going a few yards further than he should and entering the water, he ceased to be acting in the course of his employment. He had not gone off on any business or "frolic" of his own: up to the very moment when the car entered the water he was engaged on his employer's business. If he drove deliberately into the water, that act must, in my view, be regarded as the act of the appellant even though the appellant may have had no knowledge of it and as the act of the appellant it would be a wrongful act, on which he could not rely, as against the company, and he could not be heard to argue that the event was accidental.

It is, therefore, unnecessary for me to consider counsel for the respondent's alternative argument, but I may say that in my view, on the authorities, the happening might well have been "accidental" as regards the appellant, had the relationship of master and servant not existed, even though it might not have been fortuitous or undesigned.

Counsel for the appellant's next submission was that there had been a collision. On this, as I have

said, the learned judge made no express finding but contented himself with expressing a considerable doubt.

Counsel were in agreement that there is no authority defining the meaning of “collision” in relation to motor insurance, and both referred to cases arising out of marine insurance. Counsel for the appellant relied in particular on *Union Marine Insurance Co. v. Borwick* (7), in which Mathew, J., used the expression “I cannot distinguish collision with from striking against”, but, as Roche, J., said in *Mancomidad del Vapor Frumiz v. Royal Exchange Assurance* (8), “those words must be read in strict regard to the clause he was considering”.

Counsel for the respondent company relied on *The Normandy* (9) in which Gorell Barnes, J., said “I may here observe that the true meaning of collision is not a mere striking against, but a striking together”. Counsel for the respondent asked us to apply that strict interpretation. In the alternative, he submitted that in ordinary usage “collision” means more than mere contact and that it is a matter of degree when a contact is sufficiently violent to warrant describing it as a collision.

I am prepared to accept that, etymologically, a collision is the coming together into impact of two objects and that that definition is followed in marine insurance cases, where the word is used in a policy without qualification or explanation, so as to limit its use to collisions between ships, although enlarged to this extent, that it applies where the one vessel is moving and the other, although capable of navigation, is at anchor or temporarily immobilised (*Chandler v. Blogg* (10); *The Normandy* (9)).

I do not, however, propose to deal with the marine cases in any detail, because I do not consider that they should be followed in motor insurance cases, because marine insurance is a highly specialised subject and because the law of marine insurance took shape long before motor cars came into general use. It may, however, be noted that while the word is strictly interpreted where it is used without qualification in a marine policy, it is in practice frequently given a wider application in marine policies by references to collision with piers and similar objects.

In the absence of any authority or evidence to the contrary, the words used in any contract must be given their ordinary, current, meaning. In my view, the word “collision” has acquired, in ordinary usage, a meaning wider than the strict etymological sense and I see no reason to suppose that the parties to a contract of motor insurance would have intended to import principles of marine insurance. I do not propose to attempt any exhaustive definition of a collision. A collision is undoubtedly an impact and in my view it imports at least some degree of violence. I think one might, in modern motoring parlance, refer to colliding with a tree. I think a motor car might, in certain circumstances, be said to collide with a body of water. But where the substance encountered is of a yielding nature, the degree of violence necessary to establish a “collision” can only come from the speed of the vehicle. So, where a motor car is driven slowly into the sea, and I think it is clear in the present case that the car was moving very slowly indeed, it would, to my mind, be an abuse of language to describe the contact as a collision.

In my opinion, therefore, what happened was neither accidental nor a collision.

Counsel for the appellant’s final submission was that the learned judge erred when he said:

“I doubt very much, however, whether the contact of the vehicle with the sea amounts to a ‘collision’ but in any case it cannot be said that the loss or damage arose by (reason of) such contact. It was the fact that it remained in the salt water after the contact that caused the loss or damage.”

Counsel for the appellant submitted that if there was a collision and if it had been accidental, the damage caused by the sea water was not too remote to be

recoverable. He cited in support of his argument *Reischer v. Borwick* (11) and *Heskell v. Continental Express Ltd.* (12).

Counsel for the company contended that there was no evidence that the impact with the water had caused any damage; he argued that the slow action of salt water could not be damage caused “by” the collision, assuming there had been a collision. He was prepared to concede, if I understood him correctly, that if the car had been immobilized by damage sustained in the “collision”, any ensuing damage before the car could reasonably be removed would be within the policy but he argued that if the immobility of the car was only the result of being in water, as for example by the shorting of its electrical supply, then there would be no direct chain of causation between the impact and the eventual damage.

This was not in my opinion a case of any fresh intervening occurrence, when it may be necessary to distinguish between the *causa sine qua non* and the *causa causans* (as in *Jupiter General Insurance Co. Ltd. v. Rajabali Hasham and Sons* (13)). The immersion in water followed directly and inevitably from the entry into the water.

In the case of *Re Etherington and The Lancashire and Yorkshire Accident Insurance Co.* (13), a fatal injury case, Vaughan Williams, L.J., said, ([1909] 1 K.B., at p. 599):

“Courts have in particular cases dealt with the question whether the peril insured against, whether peril of the sea or accident or fire, or whatever it might be, was the proximate cause of the loss or injury so as to bring the case within the operation of the policy. In my opinion, it is impossible to limit that which may be regarded as the proximate cause to one part of the accident. The truth is that the accident itself is ordinarily followed by certain results according to its nature, and, if the final step in the consequences so produced is death, it seems to me that the whole previous train of events must be regarded as the proximate cause of the death which results.”

I would respectfully adopt that reasoning. Applying it to the present case, I think the damage caused by the sea water was a result which would ordinarily follow from the nature of the event on which the claim was based, that was, the entry of the car into the sea.

I have in this judgment dealt with the grounds of appeal in the order followed by counsel for the appellant. In summing up, it may be convenient to reverse that order. I think, with respect, that the learned judge was wrong when he held that the damage was too remote. Having so found, he did not think it necessary expressly to decide whether there had been a collision, although he clearly inclined to the view that there had not. For my part, I am quite satisfied that there was no collision. Finally, as I read the judgment, the learned judge held that the loss or damage had not been proved to be accidental. With that I agree, although basing my opinion on the existence of a relationship of master and servant.

I consider, therefore, that the decision of the learned judge was correct although I arrive at that result for different reasons, and I would dismiss the appeal with costs.

Newbold P: This appeal raises two short but extremely difficult points of law under a motor vehicle insurance policy. In their briefest form, the facts which give rise to these two points of law are that the servant of the appellant deliberately drove the appellant’s car slowly into the sea where it remained for some days, and by reason of the action of the sea on the car, but not by reason of any impact damage, the appellant suffered loss. The appellant was insured against damage to his motor vehicle arising “by accidental collision”.

The first point of law is whether in the circumstances set out any collision was accidental; and the second is whether the entry of the car into the sea was a collision.

The full facts in relation to this appeal are set out in the judgment of Spry, J.A., and I find it unnecessary to repeat them. The trial judge held that the appellant was not entitled to recover from the respondent, an insurance company, the amount of the damage as the loss did not flow from any collision; and he also held that if there had been a collision, which the trial judge doubted, it had not been accidental. From that judgment the appellant appealed.

Dealing with the first point, the word accident has different meanings in different contexts. The context in which it falls for consideration in this appeal is where an insurance company has agreed to indemnify an insured person against damage to a motor vehicle arising “by accidental collision”. In that context after careful consideration I am satisfied that an accident is an occurrence which, in relation to the insured, is neither intended nor expected nor so probable a result of a deliberate act that the result must have been foreseen as a probable, consequence of the act. Thus any damage which is deliberately caused by, or with the privity of, the insured cannot be said to be damage arising by accident, as the insured, either by himself or by another person acting with his knowledge, specifically intended to cause the damage and it could never have been the intention of the parties that the insurance company would give an indemnity against damage so caused. On the other hand, if a third person, for whose actions an insured is not in law responsible, deliberately causes damage to the motor vehicle, then that damage is, in relation to the insured, damage arising from an accident. Between these two positions there is yet an intermediate one, that is, where the damage arises from the deliberate act of the servant of the insured but the act was not done with the knowledge of the insured.

Broadly stated, a master is liable in contract for the acts of his servant done within the apparent scope of his authority and in tort for the acts of his servant done in the course of his employment. As far as liability in tort is concerned, there has been no doubt for a very long time that the master is liable for the negligent act of his servant committed in the course of his employment; but his liability for the criminal act of his servant has been one in which there have been conflicting decisions. As far as East Africa is concerned, these conflicts have been resolved by the case of *Kisumu Trading Stores v. Shah* (4) in which this Court decided that the master was liable for the criminal act of his servant committed within the course of his employment. As the master is liable for the negligent and the criminal act of his servant committed in the course of his employment, I can see no logical reason why he is not also liable for the deliberate act of his servant committed in the course of his employment, even if that deliberate act is neither negligent nor criminal. When I speak of the master being liable for the deliberate act of his servant, I use the phrase in the sense that the act of the servant is treated for all purposes of the legal relationship of the master with a third person as if it were the act of the master himself. As the master is so liable, the result which follows is that if his servant, in the course of his employment, deliberately causes damage to his master’s car and the master is insured against damage arising from accident, then the master will not be able to recover the loss arising from the servant’s deliberate act as that act, in relation to the insurance company, is treated as the master’s act. I would wish, however, to make it clear that damage caused by the deliberate act of a servant is only to be treated as damage caused by the deliberate act of the master if the act of the servant is committed within the course of his employment. This, of course, will be a question of fact. There may be many circumstances in which the nature of the act which gives rise to the damage would itself immediately result in the act being outside the course of the employment, with the result that the damage would not arise

from an act done by the servant in the course of his employment. For example if the servant, whose duties are to maintain and drive his employers' car, were deliberately to set fire to the car with a view to harming his employer or were deliberately to drive the car into a wall with the object of causing loss to his employer, then in each of such cases the acts of the servant preparatory to setting fire to the car or driving the car into the wall would automatically be outside the course of employment. The result would be that the damage, though deliberately caused by the servant, would nevertheless be damage arising by accident within the terms of a policy of insurance as far as the master was concerned. In other words, the act of the servant in these circumstances stands in precisely the same position as deliberate acts of a person for whom the insured is not in law responsible.

With those principles in mind what are the facts to which they are to be applied? It was urged that the trial judge had not made a finding that the appellant's servant deliberately drove the car into the sea. In my view such a finding is a necessary inference from the way in which the trial judge set out his judgment and, indeed, there was an abundance of evidence to support it. The surrounding circumstances in which this deliberate act was done lead clearly to the inference that the act was done in the course of the servant's employment. This being so the act of the servant in deliberately driving the car into the sea is the act of the appellant unless the appellant can show circumstances from which it should be inferred that the course of employment was terminated before the car was driven into the sea. This he has neither done nor sought to do. Accordingly I have come to the conclusion that even if the entry of the car into the sea was a collision it was not an accidental collision and therefore the appellant is not entitled to succeed.

As I have decided the first point of law against the appellant I do not propose express a view on the second point. I find it a matter of considerable difficulty to determine whether the coming of a car into contact with water in circumstances in which the contact does not itself cause damage can be said to be a collision within the meaning of such a word used in a motor vehicle insurance policy. There are arguments each way which are very potent. As it is unnecessary to decide the point of this appeal I would rather reserve it for consideration when such a point is necessary for the determination of an appeal. I would wish, however, to say that if it were a collision then I consider that the damage caused to the car in this case arose from the collision and not subsequently thereto as the trial judge has found.

For these reasons I agree with Spry, J.A., that the appeal fails and there will be an order in the terms proposed by him.

Duffus LJ: The appellant owned a motor car insured with the respondent company. The appellant avers that his car accidentally ran into the sea and became a total loss and he claims the value under his insurance policy. The respondent company denied liability. Pleadings were filed and issues agreed on and the main issue between the parties was:

“Does the plaintiff prove that the motor car sustained damage by ‘accidental collision’ within the meaning of s. 1(a) of the policy.”

Section 1, para. (1) of the policy reads:

“Section 1 – Loss or Damage

1. The Company will indemnify the Insured against loss of or damage to the Motor Vehicle and its accessories and spare parts whilst thereon
 - (a) by accidental collision or overturning or collision or overturning

- consequent upon mechanical breakdown or consequent upon wear and tear;
- (b) by fire external explosion self-ignition or lightning or burglary housebreaking or theft;
- (c) by malicious act;
- (d) whilst in transit (including the processes of loading and unloading incidental to such transit) by road rail inland waterway lift or elevator.”

I have had the advantage of reading the judgments of Newbold, P., and Spry, J.A. The relevant facts are set out in the judgment of Spry, J.A.

There were three points for decision under the agreed issue and these were had the plaintiff established:

- (a) that the incident of driving the car into the sea was a “collision” within the meaning of s. 1(1) of the policy.
- (b) that this was accidental within the meaning of an “accidental collision” as set out in the policy, and
- (c) that the car sustained damage as a result.

The learned trial judge found that the damage to the car was not as a result of the collision, in the sense of the collision being the immediate impact with the sea, but resulted because the car remained in the salt water after the impact. On this finding he dismissed the plaintiff’s claim but he also went on to say that in his opinion the fact that the vehicle went into the sea would not amount to a collision, and he also found that the plaintiff had not proved that the entry into the sea had been accidental.

The words “accidental collision” must be given their ordinary and natural meaning having regard to the whole insurance policy and in particular to para. 1 which I have already set out. I would first consider the meaning of collision and as to whether a motor car can collide with the sea. The word has been defined and considered in a number of maritime cases but apparently not in cases dealing with motor vehicle insurances. The ordinary meaning of collision as used with reference to a vehicle would, in my view, mean an impact between the vehicle and some other object. There has to be some movement but this could be movement either by the vehicle itself or by the object that it comes into contact with. Thus it is a collision if the motor car skids and hits a bank or a tree and similarly it would be a collision between both vehicles if one vehicle ran into a stationary vehicle. I think that collision as used here does not necessarily mean a violent collision provided, however, that the collision causes loss or damage to the motor vehicle. If it is agreed, as it must be, that a collision can occur with a stationary object such as a bank or a tree I can see no reason to distinguish between a solid object and a liquid body such as the sea or a lake. Each object is capable of total destruction of the car and indeed a collision with a fluid body may be much more disastrous to the occupants of the vehicle and the vehicle itself. Thus in the present case the car ran into the sea and became totally submerged and as a result was a total loss; if a collision could only be with a solid substance then the insured is not indemnified for his loss, but he would be indemnified if instead of falling into the sea the car had fallen onto a reef in the sea and suffered damage. It is interesting to note that the counsel for the appellant owner was, at one stage of the trial, led into the artifice of suggesting, that the vehicle collided with stones on the way to the sea. I am therefore of the view that a car can collide with a liquid substance whether it be the sea, a quagmire or a similar object, and this collision would be covered by the indemnity in the policy provided that damage is caused to the vehicle, and that it was accidental.

I have had much more difficulty in arriving at a decision on the question as to whether this incident could be described as accidental. The defence alleged that the driver, an employee of the appellant, deliberately drove the car into the sea. The defence did not, however, allege that the appellant was privy to this act. The learned judge has made no direct finding as to whether the driver's act was negligent or deliberate but he found that the appellant had not satisfied him that the act was accidental, and it does appear that his judgment amounts to a finding that the driver deliberately and intentionally drove the car into the sea.

Counsel for the appellant submitted that the act, even if deliberately done by the appellant's driver, would still be accidental to the owner unless he was privy to this act. He relied largely on the majority decision of the House of Lords in the case of *Trim Joint District School Board of Management v. Kelly* (2), where the House of Lords were considering the meaning to be placed on the word "accident" in the sentence "a personal injury by accident" in a claim under the Workmens Compensation Act and where the majority of the court held that a designed or intentional act could be an injury by accident provided that the act was not one designed by the injured person. The court in effect adopted the definition of "accident" given by Lord Macnaghten in the case of *Fenton v. Thorley* (15) ([1903] A.C. at p. 676), that "accidental" as used in the Act meant:

"in the popular and ordinary sense of the word as denoting an unlooked-for mishap or an untoward event which is not expected or designed."

but added the proviso that the event was not one expected or designed by the person injured.

The meaning to be given to the word "accidental" can vary according to its use. I would in this respect refer to the following passage from the judgment of Viscount Haldane, L.C., in the *Trim* case (2) when he stated ([1914] A.C. at p. 674):

"It seems to me important to bear in mind that 'accident' is a word the meaning of which may vary according as the context varies. In criminal jurisprudence crime and accident are sharply divided by the presence or absence of mens rea. But in contracts such as those of marine insurance and of carriage by sea this is not so. In such cases the maxim 'In jure non remota causa sed proxima spectatur' is applied.

It is therefore necessary, in endeavouring to arrive at what is meant by 'accident,' to consider the context in which the word is introduced. The scope and purpose of that context may make the whole difference."

The basic rule in interpreting the policy is to ascertain what was the intention of the parties from the document itself. Section 1 of the policy provides for loss or damage to the vehicle, and para. 1, which I have already set out in full, sets out the occasions on which the Insurance Company will indemnify the insurer against the loss or damage to his car. The indemnity takes effect when the loss or damage is caused by any of the incidents set out under the four sub-heads. Each of these sub-heads deals with different causes of the loss or damage; thus:

- (a) deals with an accidental collision or overturning,
- (b) with a fire, explosion, or theft, etc.
- (c) by a malicious act, and
- (d) whilst a vehicle is in transit.

I think that the draftsman of the policy intended that each sub-head should cover damage caused in different ways. We are particularly concerned here with the meaning of "accidental collision" under (a) and "by malicious act" under (c).

Malicious act here must mean a deliberate and unlawful act intended to cause damage to the vehicle. It would appear that the word “accidental” as used under sub-head (a) must have been used in the popular meaning of something that happens by chance, an unintended or undesigned act. I would here quote a short passage from the judgment of Lord Dunedin, one of the minority judgments in the *Trim* case (2) ([1914] A.C. at p. 686) which aptly explains the meaning which I believe was intended for “accidental” in the context of this policy:

“It must be conceded that the injury here was caused by design. That is to say, there was an intention to inflict an injury. To my thinking, the word ‘accident’ in popular language is the very antithesis of design. I brush aside at once all argument as to acts which can only be described as acts by design inasmuch as they are acts of conscious volition. The design of which I speak must be design to inflict the injury, not design to do the act which may, as it turns out, be the cause of the injury.”

In the *Trim* case (2) the court were considering an interpretation to be made under an entirely different context to that contained in this insurance policy. It appears to me that in the present case the author of the document used the word “accidental” as governing collision in its popular meaning of something not done intentionally, that is, collision that happens without intention or design, and then went on to provide by sub-head (c) for those acts which were intentional or designed to cause damage to the vehicle.

I am therefore of the view that “accidental collision” does not include a collision which happens as a result of an act intentionally designed to cause a collision for the purpose of damaging the vehicle. In this case the learned judge has found that the plaintiff has not satisfied him that this was an accident and as I have said, his judgment in my view, amounts to a finding that this was a deliberate and designed act on the part of the driver and it must also mean that the driver intentionally drove into the sea in order to damage the vehicle. There was, in my view, ample evidence to support this finding.

This would not, therefore, be an accidental collision within the meaning of s. 1 para. 1(a) of the policy as the appellant claimed, but it would be a case where damage has been caused to the vehicle by a malicious act under para. 1(c). The appellant, however, specifically brought his claim under para. 1(a) relying on the fact that the entry into the sea was accidental. It is difficult to understand why he did not also claim in the alternative under sub-head (c) for damage by a malicious act but he has not done so and even at the hearing of this appeal he specifically abandoned a ground of appeal on this point, and only argued on his claim that this was an accidental collision.

It may be, of course, that he did not claim that it was a malicious act as he was afraid that the respondent company might then have pleaded and proved that he was a privy to this malicious act. In any event the appellant has not claimed for any damage under sub-head (c), and it is now too late to make this claim. I agree with the learned judge that the onus is on the plaintiff to prove that this was an accidental collision and that the plaintiff has, on the facts that he has found, failed to do so and for this reason I agree that the claim was correctly dismissed.

I have not therefore found it necessary to consider the further point as to whether the appellant could have based the claim against the insurance company on the tortious or criminal act of a servant acting in the course of his employment. In my view, this question does not arise here, and in any event, the policy would under para. 1(c) indemnify the insured for a malicious act done by his servant, even if done in the course of his employment, provided that the insurer was not a privy to this act. However, as I have said, the appellant has not made any claim under this head.

I agree entirely with my brother Spry's judgment on the question of the damage caused by the sea water. In my view the damage caused by the sea water followed as an ordinary consequence of the entry of the car into the sea. I agree therefore that this case was correctly dismissed by the judge although my reasons for this decision are different from the judge's and also different from those of the learned President and Spry, J.A. I agree that the appeal be dismissed with costs.

Appeal dismissed.

For the appellant:

Ashraf Khan and W. H. Ansari, Aden

For the respondent:

Horrocks, Williams & Beecheno, Aden

W. S. Deverell

**The New Great Insurance Company of India Ltd v Lilian Evelyn Cross and
another**
[1966] 1 EA 90 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	30 July 1965
Case Number:	11/1965
Before:	Newbold VP, Crabbe and Sir Clement de Lestang JJA
Sourced by:	LawAfrica
Appeal from:	The High Court of Kenya – Sherrin, J.

[1] *Insurance – Motor insurance – Third party risks – Compulsory third party insurance – Action by injured third party – Car driven with permission of owner – Driver disqualified from holding a driving licence – Clause in policy of insurance avoiding liability in case of such a driver – Whether such a condition or restriction valid – Insurance (Motor Vehicles Third Party Risks) s. 8, s. 10 and s. 16 (Cap. 405) (K.).*

[2] *Statute – Construction – Legislation adopted from Commonwealth country – Interpretation qualified by different circumstances.*

Editor's Summary

The respondents were injured in a motor accident and recovered judgment in other proceedings against the owner (referred to as “the insured”) of the car, the user of which the appellant (referred to as “the insurer”) had covered by a third party policy. The driver, who had the insured's permission to drive, was

at the time disqualified from holding a driving licence. Notice of the proceedings against the insured had been given to the insurer, but when called upon to meet the judgment it repudiated liability. The policy was in the usual form containing an Exceptions clause purporting to exclude liability of the insurer “in respect of any claim arising whilst the Motor Vehicle is being driven by . . . any person other than the Authorised Driver”. The schedule to the policy defined an “Authorised Driver” as “any person driving on the insured’s order or with his permission Provided that (he has a licence) and is not disqualified . . . from driving”. The respondents sued the insurer under s. 10(1) of the Insurance (Motor Vehicles Third Party Risks) Act (referred to as “the Act”). The insurer’s defence was that the owner “had broken the conditions of the policy and the policy had been thereby avoided” in that the driver, being disqualified, was not an authorised driver. The trial judge gave judgment for the respondents holding, firstly, that the terms of the avoidance clause constituted an abandonment by the insurer of any contractual right it had under the policy to avoid any liability that would otherwise arise, and secondly, that s. 8 and s. 10 of the Act over-rode the exclusion of a disqualified driver from the definition of an authorised driver in the policy. The insurer contended on appeal that the Act was very nearly identical to provisions of three separate British enactments and that it should receive a similar construction, that the cases on s. 8 in East Africa and its English equivalent

showed that where there was a restriction in the scope of the policy or a condition excluding liability ab initio, as when the driver is disqualified, the condition takes effect before the event giving rise to the liability and s. 8 only applies to events which happen after the liability has arisen; that the proviso excluding a disqualified driver from the class of authorised persons in the policy was not a condition but a definition limiting the type of person who was authorised to drive; that s. 8 and s. 16 of the Act, when contrasted, supported the normal device of excluding liability ab initio by restricting the specified class of persons referred to in s. 5(b); and that the respondents could not show for the purposes of s. 10 that the injury caused by a disqualified driver created a liability within the terms of the policy.

Held – Per Newbold VP –

- (i) the effect of s. 4 and s. 5 was that a statutory duty was imposed upon, inter alia, the owner of the vehicle to cover by insurance any liability which the owner might incur in respect of injury to third parties arising from the use of the vehicle on the road by such person, persons or classes of persons as may be specified in the policy;
- (ii) Section 8 made ineffective a condition providing that no liability shall arise under the policy insofar as it related to such liabilities as were required to be covered under s. 5(b) and insofar as any such condition was prayed in aid to avoid liability to a third party;
- (iii) the proviso in the schedule to the policy dealing with disqualification must be treated as a condition coming within s. 8;

Bright v. Ashfold, [1932] 2 K. B. 153; *Gray v. Blackmore*, [1934] 1 K.B. 95; (1933) All E.R. Rep. 520; *Alamanzane Kakoza v. R.*, [1958] E.A. 444 and *R. v. Amani Marunda*, [1960] E.A. 281 not followed.

- (iv) the liability in the instant case was both required to be covered by s. 5(b) and in fact was so covered, because the condition which excluded liability in the case of a disqualified driver was rendered ineffective by s. 8;
- (v) in construing adopted legislation previous decisions under it may be qualified if they are clearly wrong or at variance with each other; further the absence of a Motor Insurers Bureau Agreement in East Africa was a circumstance making the British decisions less persuasive than they would otherwise be;

Per Crabbe, JA (concurring in the result):

- (vi) it is the user not the driver that is required to be covered by the policy so that a condition restricting the class of drivers will not avoid the independent liability of the insurer to an injured third party under s. 10 but may disable the insured from recovering by way of indemnity under the policy;

Per De Lestang, JA (dissenting):

- (vii) Section 8, s. 10 and s. 16 are saved from repugnancy by giving “any condition” in s. 8 a narrow rather than a wide meaning, so that restrictions in the scope of the cover other than those specified in s. 16 are permissible; the restriction of the cover to a qualified driver was permissible;
- (viii) there is a presumption, where a law has received a judicial interpretation and is adopted without change, that it is intended to bear that interpretation on being re-enacted.

Appeal dismissed.

Cases referred to in judgment:

(1) *Dharmanshi Vallabhji v. National & Grindlay's Bank Ltd.*, [1964] E.A. 442 (C.A.).

- (2) *Merchants' Manufacturing Insurance Co. Ltd. v. Hunt*, [1940] 4 All E.R. 205.
- (3) *Zurich General Accident Co. Ltd. v. Morrison*, [1942] 1 All E.R. 529.
- (4) *Monk v. Warbey*, [1935] 1 K.B. 75.
- (5) *McLeod v. Buchanan*, [1940] 2 All E.R. 179.
- (6) *Bright v. Ashfold*, [1932] 2 K.B. 153.
- (7) *Gray v. Blackmore*, [1934] 1 K.B. 95; [1933] All E. Rep. 520.
- (8) *Alamanzane Kakoza v. R.*, [1958] E.A. 444.
- (9) *R. v. Amani Marunda*, [1960] E.A. 281.
- (10) *R. v. Harnam Singh*, [1950] 24 K.L.K. 101.
- (11) *Elliot v. Grey*, [1980] 1 Q.B. 367; [1959] 3 All E.R. 733.
- (12) *John T. Ellis Ltd. v. Walter T. Hind*, [1947] 1 K.B. 475.
- (13) *Marsh v. Moores*, [1949] 2 K.B. 208.
- (14) *Hardy v. Motor Insurance Bureau*, [1964] 2 All E.R. 742.
- (15) *Escoigne Properties Ltd. v. I.R. Comrs.*, [1958] A.C. 549; [1958] 1 All E.R. 406.
- (16) *Heydon's Case* (1584), 3 Co. Rep. 70; [1957] 1 All E.R. 291.
- (17) *Ward v. Riley*, [1867] L.R. 3 C.P. 26.
- (18) *Moss v. Elphick*, [1910] 1 K.B. 465.
- (19) *Wyatt v. Guildhall Insurance Co. Ltd.*, [1937] 1 K.B. 792; [1937] 1 All E.R. 792.
- (20) *Bonham v. The Zurich General Accident Insurance*, [1944] 2 All E.R. 573.
- (21) *Howarth v. Dawson & Others* (1946), 80 Lloyd's Rep. 19.
- (22) *Herbert v. Railway Assurance Co.*, [1938] 1 K.B. 650.
- (23) *Ramadhani Ali v. R.*, [1958] E.A. 344.

The following judgments were read:

Judgment

Newbold VP: This appeal raises a point of law which is of considerable importance not only to insurance companies but also to the general public at large. The appellant company, which I shall refer to as the insurer, insured the owner of a motor vehicle under a policy, the heading of which and the main relevant provisions of which were as follows:

“Motor Vehicle Policy
(Ordinance Liabilities only)

Now this policy Witnesseth: –

That in respect of events occurring during the Period of Insurance and subject to the terms exceptions

conditions and Limits of Liability contained herein or endorsed hereon . . .

Liability To Third Parties

1. The Company will indemnify the Insured in the event of accident caused by or arising out of the use of the Motor Vehicle on a Road against all sums including claimant's costs and expenses which the Insured shall become legally liable to pay in respect of death of or bodily injury to any person.
2. In terms of and subject to the limitations of para. 1 of this Policy the Company will indemnify any Authorised Driver who is driving the Motor Vehicle provided that such Authorised Driver.
 - (a) shall as though he were the Insured observe fulfil and be subject to the Terms of this Policy insofar as they can apply;
 - (b) is not entitled to indemnity under any other policy.

Avoidance of Certain Terms and Right of Recovery

Nothing in this Policy or any endorsement hereon shall affect the right of . . . any other person to recover an amount under or by virtue of the Legislation

BUT the Insured shall repay to the Company all sums paid by the Company which the Company would not have been liable to pay but for the Legislation.

Exceptions

The Company shall not be liable in respect of

1. any claim arising whilst the Motor Vehicle is
 - (a) . . .
 - (b) being driven by or is for the purpose of being driven by him in the charge of any person other than an Authorised Driver.

Conditions

1. This Policy and the Schedule shall be read together as one contract and any word or expression to which a specific meaning has been attached in any part of this policy or of the Schedule shall bear such specific meaning wherever it may appear.

Schedule

Authorised Driver: Any of the following:

The Insured.

Any person driving on the Insured's order or with his permission

Provided that the person driving is permitted in accordance with the licensing or other laws or regulations to drive the Motor Vehicle or has been so permitted and is not disqualified by order of a Court of Law or by reason of any enactment or regulation in that behalf from driving the Motor Vehicle."

On April 1, 1962, while the car was, with the permission of the owner, being driven by a Mr. Patel, an accident occurred. At the time that Mr. Patel was driving the car was disqualified from holding a licence. As a result of the accident the respondents suffered injury. Subsequently the respondents sued the owner of the car and recovered judgment for the sum of Shs. 22,756/30. Due notice of these proceedings had been given to the insurer, but when it was called upon to pay this sum it repudiated liability. The respondents thereupon brought a suit against the insurer claiming that the insurer was liable under s. 10(1) of the Insurance (Motor Vehicles Third Party Risks) Act (hereinafter referred to as the Act) to satisfy the said judgment with interest and costs. The defence of the insurer was, inter alia, that no liability arose under the terms of the policy as the owner "had broken the conditions of the Policy and the Policy had been thereby avoided" by reason of the fact that at the time of the accident the driver was not an authorised driver as he was disqualified from holding a licence. The facts were not in dispute and the trial judge gave judgment in favour of the respondents, holding that the insurer was not entitled in law to avoid liability. From that judgment the insurer has appealed.

The grounds upon which the trial judge held that the insurer was liable were, first, that the terms of the avoidance clause constituted an abandonment by the insurer of any contractual right it had under the policy to avoid any liability that would otherwise arise; and, secondly, that by reason of the provisions of s. 8 and s. 10 of the Act the proviso to the definition of authorised driver had no effect. The grounds of appeal were that the trial judge had erred in law in arriving at his conclusions on those two matters.

At the appeal, counsel for the appellant urged generally that the provisions of the Act had been taken from British enactments which had been the subject of judicial interpretation in Britain and that while there was no decision which was binding upon this court, nevertheless this court should have regard to those decisions as constituting very persuasive authority. The law as I understand it on this subject is stated in a passage from my judgment in *Vallabhji v. National and Grindlays Bank* (1). I there said ([1964] E.A. at p. 446):

“I accept that when Kenya adopts the legislation of a Commonwealth country with a similar system of law then, in construing the provisions of the adopted legislation, regard should be had to the judicial decisions of the Commonwealth country on the meaning of the equivalent section. I accept that proposition subject to two qualifications: first that any such decision is not absolutely binding and may be disregarded if in the view of the East African court the decision is clearly wrong; and, secondly, that such decisions disclose a consistent interpretation of the section in question and are not at variance with one another.”

I would add that regard must also be had to the circumstances in which the judicial decision of the Commonwealth country was given. The Act was originally enacted in Kenya early in 1945 as the Motor Vehicles Insurance (Third Party Risks) Ordinance, 1945, and, subject to minor and for the purposes of this appeal immaterial amendments, it is that enactment which this court is now called upon to construe. All of the provisions are contained in one comprehensive enactment designed, according to the preamble, “to make provision against third party risks arising out of the use of motor vehicles”. Consequently in construing any particular section of the Act regard has to be had to all the other sections of the Act. The sections of the Ordinance (as it then was) were culled from the provisions of British legislation and were very nearly identical with such provisions as were adopted. But the British provisions appear in three separate enactments, that is, the Third Party (Rights against Insurers) Act, 1930, the Road Traffic Act, 1930 and the Road Traffic Act, 1934, and subsections were omitted from the adopted sections. Counsel for the appellant referred to decisions on provisions of the 1930 Act which are reproduced in the Kenya Act, but some of those decisions were given prior to 1934 and thus did not have regard to certain other provisions which appear in the 1934 Act and which in Kenya form part of one comprehensive Act. Further, it must be borne in mind that about the time when the Kenya legislation was introduced the statutory provisions in Britain in relation to the rights of third parties who had been injured from the use of vehicles were to a considerable extent of somewhat academic interest, and thus not subjected to critical examination by the House of Lords, as the position of third parties was protected by extra-statutory machinery in the form of what was known as the Motor Insurers Bureau Agreement. As a result, in my view, the judicial decisions of Britain on the provisions which are the origin of the Act are, in these particular circumstances, of somewhat less persuasive authority than they would otherwise be.

Dealing with the grounds of appeal against the holding of the judge in relation to the avoidance clause, it was urged that the trial judge erred in following the dicta of Stable, J., in *Merchants’ and Manufacturers’ Insurance Co. Ltd. v. Hunt* (2) ([1940] 4 All E.R. at p. 211). It was pointed out that the view of Stable, J., was doubted by Luxmoore, L.J., in the report of that case on appeal ([1941] 1 All E.R. at p. 137); and also that it was not followed by Atkinson, J., in the *Zurich General Accident Co. Ltd. v. Morrison* (3) ([1942] 1 All E.R. at p. 535). I confess that I have not found it easy to understand precisely what this clause means. As the wording of the clause is that of the insurer in whose policy it appears, in the event of different possible constructions the normal rule of

interpretation would be that it would be construed in a manner unfavourable to the insurer. For my part, however, I cannot construe this clause as meaning that the parties to the policy had intended by it that the insurer would waive any rights which it otherwise had of avoiding the policy. I consider that the proper construction of this clause is that it gives to the insurer the contractual right to recover from the insured any sum which the insurer has had to pay solely by virtue of the provisions of the Act and that the reason for this contractual right is to be found in the proviso to s. 8 of the Act. Be that as it may, whatever the clause means I do not consider that it can bear the meaning attached to it by the trial judge and, accordingly, I do not consider that the respondents would have been entitled to succeed in their action by virtue of the provisions of this clause.

Turning now to the grounds of appeal relating to the right of an insurer to insert provisions in a policy which would result in avoiding liability to third parties, this involves the very close consideration of the provisions of the Act. The obvious intention of the Act, as ascertained both from the preamble and from its provisions, is to enable third parties who have received injury from the use of a motor vehicle on the road to recover compensation for the injury even if the person who inflicted it is not in a position to pay any compensation so awarded. It is against that background that each of the provisions of the Act must be interpreted. Section 4(1) states that:

“... it shall not be lawful for any person to use, or to cause or permit any other person to use, a motor vehicle on a road unless there is in force in relation to the user of the vehicle by that person or that other person, as the case may be, such a policy of insurance... in respect of third party risks as complies with the requirements of this Act.”

Section 5 provides:

“In order to comply with the requirements of s. 4 of this Act, the policy of insurance must be a policy which –

- (a) ...
- (b) insures such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of, or bodily injury to, any person caused by or arising out of the use of the vehicle on a road.”

There then follow provisos setting out that a policy need not cover any liability arising in certain cases which are immaterial to this appeal, but these provisos themselves point to the extensive nature of the liability required to be covered. In subsequent sections reference is made on a number of occasions to “such liability as is required to be covered by a policy of insurance under para. (b) of s. 5”. It seems to me that the only possible construction of these two sections is that a statutory duty is imposed upon, inter alia, the owner of a vehicle to cover by insurance any liability which that owner may incur in respect of injury to third parties arising from the use of the vehicle on the road by such person, persons or classes of persons as may be specified in the policy. This would seem also to be the view taken by the British courts of the corresponding provisions of the Road Traffic Act, 1930 (see *Monk v. Warbey* (4) and *McLeod v. Buchanan* (5)). In other words an owner must take out a policy of insurance to cover any liability in respect of injury to third parties which he may incur from the use of the vehicle on the road either by himself or by some other person or persons. He need not cover any conceivable person who could use the vehicle, but he must, to comply with the provisions of s. 5(b), cover some person or persons who must be specified in the policy. Thus the cover required by the section may properly be restricted to the vehicle when used by the owner himself,

or to the vehicle when used by any other named person, or, again, to the vehicle when used by any specified class of persons; but, whoever is specified in the policy as covered in relation to the user of the vehicle, that cover must be against “any liability which may be incurred” by the owner or the specified person “in respect of the death of, or bodily injury to, any person caused by or arising out of the use of the vehicle on a road.” I do not propose in this appeal to go into the the question of any possible distinction between a person who uses a vehicle and a person who drives it. Suffice it to say that a person who drives a vehicle clearly uses it and an owner may use a vehicle without driving it himself.

That such is the duty cast upon the owner of a vehicle is further emphasised by ss. 7 and 14 of the Act. Section 7 requires an insurance company to issue a certificate of insurance, which should contain particulars of any conditions subject to which the policy is issued, when the insurance is effected and it is to be noted that the prescribed form for such a certificate sets out that a policy covering the liabilities required to be covered by the Act has been issued. By s. 14 the owner of the vehicle has to produce this certificate when applying for a licence, or renewal of a licence, for the vehicle. I am satisfied therefore that the Act places a duty on the owner of a vehicle to insure at least some person against any liability to third parties for bodily injury which may arise from the use by that person of the motor vehicle on the roads. In Britain the existence of such a duty is recognised in respect of civil suits against the owner, but it seems to be the position that a policy need not provide cover co-extensive with the duty and that an owner only commits a criminal offence if, at the time of the offence, the vehicle is being used outside the terms of the insurance policy, no matter how restricted may be the cover provided by the policy. I confess I do not see the logic of this and I do not consider such to be the law of Kenya. I consider that the consequence of any breach of the requirements of ss. 4 and 5 would be, as far as the owner committing the breach is concerned, the commission of an offence under s. 4(2). But the fact that the owner would commit an offence would not prevent the insurance company from contractually limiting the cover provided by the policy and thus vitiating the whole object of the Act. This is precisely what counsel for the appellant has submitted it is open to insurance companies to do. Consequently, in order to ensure the protection of the injured third party, provision had to be included in the Act to preclude, in relation to the injured person who is not a party to the contract of insurance, the contractual right of the insurer to avoid liability. This was done by ss. 8, 10 and 16.

Section 8 of the Act is in the following terms:

“Any condition in a policy of insurance providing that no liability shall arise under the policy, or that any liability so arising shall cease in the event of some specified thing being done or omitted to be done after the happening of the event giving rise to a claim under the policy, shall, as respects such liabilities as are required to be covered by a policy under s. 5 of this Act, be of no effect:

Provided that nothing in this section shall be taken to render void any provision in a policy requiring the persons insured to repay to the insurer any sums which the latter may have become liable to pay under the policy and which have been applied to the satisfaction of the claims of third parties.”

It is urged on behalf of the insurers that where a policy purports to provide to the specified person a general cover but there is a condition which ab initio excludes liability from arising, as for example a provision that the insurer is not liable if the person specified in the policy as covered by the insurance is disqualified from holding a licence, then the provisions of this section do not nullify such a condition. It is urged that such a condition takes effect before the event giving rise

to the liability occurs and that s. 8 only applies to events which happen after the liability has arisen. In support of that contention Mr. Hunter referred to *Bright v. Ashfold* (6); *Gray v. Blackmore* (7); the Uganda case of *Alamanzane Kakoza v. R.* (8); and the Tanganyika case of *R. v. Amani Marunda* (9). Those cases undoubtedly support the submissions of the insurer. In the case of *R. v. Harnam Singh* (10), the Kenya Supreme Court in its appellate jurisdiction reached a contrary conclusion. Which of these conflicting views is correct?

The section in the Act differs from the British section, which appears as the Road Traffic Act, 1930, s. 38, in that in the Kenya Act the comma appears after the word “policy” instead of after the word “cease”. Grammatically the words “in the event of some specified thing being done or omitted to be done after the happening of the event giving rise to the claim” can, with the comma where it is in the Kenya Act, apply only to the words “any liability so arising shall cease” and not to the words “no liability shall arise”. Mr. Hunter urged that the different positioning of the comma in Kenya should not give rise to any different interpretation and he submitted that in construing the terms of the section no attention should be paid to punctuation. I accept that the rule of construction in Britain in relation to old statutes was that the courts did not have regard to punctuation in interpreting a section. The reason for this was that until about 1850 the punctuation of sections was inserted after the legislation had been enacted, with the result that the punctuation had received no legislative authority. Whether that rule of construction would apply in Britain in relation to modern statutes is open to doubt. However, whatever may be the position in Britain, I have no doubt whatsoever that in East Africa the courts should in the construction of a section, have regard to the punctuation of the section just as much as they should have regard to any other part of it. The reason for this is that the section as enacted by the legislature contains the punctuation. Indeed, there are a multitude of examples of amendments to sections containing amendments to the punctuation. In any event I cannot see how it is possible to attach the words “in the event of some specified thing being done . . . after the happening of the event giving rise to a claim . . .” to the words “no liability shall arise” for the simple reason that liability would already have arisen before the event; therefore, those words clearly attach and attach only to the words “any liability so arising shall cease”. This logical construction is merely reinforced by the positioning of the comma in the Kenya Act. I consider, therefore, that the decision in the *Harnam Singh* case (10) was correct and that the decisions in the other cases are bad law and should not be followed in East Africa.

The effect, therefore, of this section is that a condition in a policy of insurance providing that no liability shall arise under the policy is ineffective insofar as it relates to such liabilities as are required to be covered by a policy under s. 5(b) of the Act and insofar as any such condition is prayed in aid to avoid liability to a third party who has been injured. Insofar, however, as the relationship of the insurer and the insured is concerned, then, by virtue of the proviso to the section, if the policy contains a provision requiring the insured to repay to the insurer any amount which the insurer has had to pay to a third party in circumstances in which the condition applies, such a provision is perfectly valid.

It still remains, however, to determine whether any provision in a policy which excludes liability is or is not a condition for the purposes of this section. It is urged that the proviso excluding from the authorised driver any person who has been disqualified is not a condition, but a definition limiting the type of person who is an authorised driver. While in other circumstances a proviso may have such an effect, I am satisfied that such is not the position in this case. The policy on the face of it purports to be one which covers the liabilities required to be covered by the Act. As I have already stated, s. 5(b) requires that there must be someone who is insured in respect of any liability. If this proviso is to operate

as a definition of the person authorised to drive and not as a condition, then the result would be that a policy which purports to be one covering the liabilities required by the Act to be covered is not, and never could be, such a policy; and, in spite of the apparently clear words of paras. 1 and 2 of the policy setting out the cover provided to the insured and to an authorised driver in respect of the claims of third parties arising from the use of the vehicle on the road, the owner would be committing an offence and third parties would not be protected. I have no doubt that in these circumstances the proviso dealing with disqualification must be treated as a condition coming within s. 8.

It is also submitted that s. 8 should not receive the construction I have placed on it as then there would be no necessity for s. 16. I accept that in construing the terms of one section of the Act regard should be had to all the provisions of the Act and one section should not normally be so construed as to make another section completely superfluous. Section 16, so far as is material, is as follows:

“Where a certificate of insurance has been issued ... to the person by whom a policy has been effected so much of the policy as purports to restrict the insurance of the persons insured thereby by reference to any of the following matters –

(Here follow a number of matters which do not include any reference to disqualification from holding a driving licence)

shall, as respects such liabilities as are required to be covered by a policy under para. (b) of s. 5 of this Act, be of no effect:

Provided that nothing in this section shall require an insurer to pay any sum in respect of the liability of any person otherwise than in or towards the discharge of any liability of any person which is covered by the policy by virtue only of this section shall be recoverable by the insurer from that person.”

I accept that if ss. 8 and 16 were dealing with precisely the same matter then court would be forced to choose between a construction of s. 8 which would be contrary to the normal grammatical meaning of the words of the section and a construction which would result in s. 16 being superfluous. In my view, however, the two sections do not relate to precisely the same matter. Section 8 deals with a condition in a policy which seeks either to prevent liability from arising or to avoid a liability which has arisen. Section 16 deals with an attempt to restrict the insurance by reference to certain specified matters. The distinction may be fine and in a number of cases the two sections may overlap but the distinction nevertheless exists. Section 8 deals with the totality of liability; s. 16 does not necessarily do so. But the clearest difference is in the proviso to each section. In the case of s. 8 a contractual liability is required before an insurer can recover from the insured, hence the reason for the avoidance clause in the policy. In a case falling within s. 16, however, the insurer could recover from the insured without there being any contractual liability. Consequently the existence of s. 16 does not, in my view, affect the interpretation which I would place upon s.8. However, even if it were not possible to distinguish between the subject matter of the two sections I would not apply those canons of construction under which s. 16 is to be regarded as the dominant section with the consequence that s. 8 must be construed in a strained and narrow manner. Canons of construction are a means to an end – the ascertainment of the intention of the legislature. If that end has already been achieved and the intention ascertained then the means must not be utilised in order to defeat the end. I am satisfied that the intention of the Act is to provide protection to third parties who receive injury. The logical and grammatical construction of s. 8 results in their receiving that protection. I

would not apply canons of construction which would result in a strained construction of s. 8 and the defeat of the object of the Act.

The third section to which reference is made is s. 10: This section, so far as is relevant, is in the following terms:

- “10(1) If, after a policy of insurance has been effected, judgment in respect of any such liability as is required to be covered by a policy under para. (b) of s. 5 of this Act (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then, notwithstanding that the insurer may be entitled to avoid . . . or may have avoided . . . the policy, the insurer shall, . . . pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability . . .
- (4) No sum shall be payable by an insurer under . . . this section if, in an action . . . he has obtained a declaration that, apart from any provision contained in the policy he is entitled to avoid it on the ground that it was obtained by the non-disclosure of a material fact, or by a representation of fact which was false in some material particular . . .
- (6) . . . ‘liability covered by the terms of the policy’ means a liability which is covered by the policy or which would be so covered but for the fact that the insurer is entitled to avoid . . . or has avoided . . . the policy.”

It is by virtue of this section that the respondents seek to recover from the insurer under a contract of insurance to which the respondents were not party. It is submitted on behalf of the insurer that this section only applies where the liability is covered by the terms of the policy and that in this case no liability arose under the policy for any injury caused by a disqualified driver. I accept that this section only applies where both the liability is required under s. 5(b) to be covered by a policy and the liability is in fact covered by the terms of the policy or would be so covered were it not for the fact that according to the terms of the policy the insurer is entitled to avoid it. A liability may be required under s. 5(b) to be covered by a policy and yet the liability may not in fact be covered by the particular policy. An example of this is where a policy is taken out relating to the use of the vehicle by the insured only but in fact the vehicle is used by another person. Another example would be where the insured obtained the policy by non-disclosure of a material fact; this would enable the insurer to take action in accordance with the appropriate provisions of s. 10 and to obtain a declaration that, although the policy apparently covered the liability, nevertheless in fact it did not do so as there was never in existence a contract of insurance. On the facts of this appeal, however, the liability was both required to be covered by s. 5(b) and in fact so covered, as the condition which excludes liability in the case of a disqualified driver is, under s. 8, rendered ineffective.

In the result, therefore, the owner of this vehicle had taken out a policy of insurance which purported to indemnify him (and in addition any authorised driver) in respect of liability to the respondents resultant from injury to them from the use of the vehicle on the road. This was a liability required to be covered by s. 5(b). The owner became liable to the respondents by reason of injury caused to them from the use of the vehicle on the road. Were it not for the condition relating to disqualification the insurer would have to indemnify the owner. Under s. 8 this condition is, as regards the respondents, ineffective. The liability to the respondents is thus both required to be covered under s. 5(b) and in fact so covered by the policy. Under s. 10 the insurer is liable to pay to the respondents the amount of the judgment they have obtained against the owner. In my view, therefore, the decision of the trial judge was correct and I would dismiss the appeal with costs. As Crabbe, J.A., agrees that the appeal should be dismissed with costs, it is so ordered.

Crabbe JA: I agree with the conclusion of the learned Vice-President, but as there is a difference of opinion among us on a matter of such public importance, I feel I ought to state my reasons in my own words. The sole question turns entirely on the exception clause in the policy.

The respondents' claim was brought under s. 10 of the Insurance (Motor Vehicles Third Party Risks) Act, (Cap. 405), (hereinafter referred to as the Act). This section confers upon an injured third party an independent right to claim from an insurer the satisfaction of any judgment together with costs obtained against persons insured in respect of any liability as required to be covered under para. (b) of s. 5 of the Act. The main object of the Act is to protect third parties from the consequences of accidents, and s. 4 of the Act imposes a duty upon the owner of a motor vehicle which he uses himself, or permits, or causes, others to use to take an insurance policy in respect of third party risks. Section 4(1) of the Act provides as follows:

"Subject to the provisions of this Act, it shall not be lawful for any person to use, or to cause or permit any other person to use, a motor vehicle on a road unless there is in force in relation to the user of the vehicle by that person or that other person, as the case may be, such a policy of insurance or such a security in respect of third party risks as complies with the requirements of this Act."

By s. 5(b) the policy must be one which:

"insures such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of, or bodily injury to, any person caused by or arising out of the use of the vehicle on a road:"

It was not disputed that at the time of the accident in this case there was in force in relation to the user of the car a valid policy of insurance (tendered in evidence and marked Ex. 1) in respect of third party risks which complied with the requirements of the Act. Under cl. 1 of Ex. 1 the defendant company under-took to "indemnify the Insured in the event of accident caused by or arising out of accident caused by or arising out of the use of the Motor Vehicle on a Road against all sums including claimants' costs and expenses which the insured shall become legally liable to pay in respect of death of or bodily injury to any person."

The defence in this case was that the defendant company was exempted from liability, because the driver of the car at the material time was not insured. The policy, which the defendant company issued in respect of the car, contained the following exception clause:

"The Company shall not be liable in respect of

1. any claim arising whilst the Motor Vehicle is
 - (a) being used otherwise than in accordance with the Limitations as to Use;
 - (b) being driven by or is for the purpose of being driven by him in the charge of any person other than an Authorised Driver."

In the schedule attached to the policy an authorised driver is defined as the insured himself and any person driving on the insured orders or with his permission. But this is subject to the proviso:

". . . that the person driving is permitted in accordance with the licensing or other laws or regulations to drive the Motor Vehicle or has been so permitted and is not disqualified by order of a Court of Law or by reason of any enactment or regulations in that behalf from driving the Motor Vehicle."

That the driver of the car had been disqualified from driving at the material time was beyond dispute. The question is, how far does that affect the liability of the defendant company? In my view the answer depends upon a proper construction of s. 4(1) of the Act. This subsection provides that a person may not use or cause or permit a motor vehicle to be used on the road unless there is a policy in force covering the use of such motor vehicle. In this case the use of the car was covered by a valid policy, but the actual driver was not himself insured. In my judgment, it is sufficient, if the policy of the owner of the car was in force at the material time. Section 4 does not say that anybody should be insured, it merely provides that a policy in compliance with the requirements of the Act must be in force. It is the user of the vehicle, and not the driver, that is required to be covered by a policy of insurance, and it is clear from the decision of *Elliot v. Gray* (11) that the element of driving a vehicle is not an essential element of “using” the vehicle. In this particular case the driver was using the car with the authority of the owner; there was a policy in force which would protect third parties, and in my view it was immaterial whether or not the driver himself was covered by a policy of insurance.

The insurance (Motor Vehicles Third Party Risks) Act of Kenya is modelled on the English Road Traffic Acts and s. 4(1) of the Kenya Act is in the same terms as s. 35(1) of the English Road Traffic Act, 1935. In *John T. Ellis, Ltd. v. Walter T. Hind* (12) the Divisional Court in England had to consider whether s. 35(1) requires that there should be a policy of insurance in force which covers the personal liability of a driver, or is it sufficient that there should be a policy in force covering the then user of the car in respect of third party risks. It was decided that the subsection does not require that there shall be a policy in force covering the liability of the actual driver, provided there is a policy in existence covering the particular use of the vehicle at the time of the accident. (See also *Marsh v. Moores* (13).)

In the recent case of *Hardy v. Motor Insurers' Bureau* (14) the English Court of Appeal had to consider the combined effect of ss. 203 and 207 of the English Road Traffic Act, 1960. These sections are respectively similar to ss. 5 and 10 of the Kenya Act (Cap. 405). The appellant in that case was a chief security officer at a large factory. One day he saw, in an adjoining car park, a van with a road fund licence that had been stolen from one of the company's cars. When the driver attempted to leave the park, the appellant stopped him and opened the near side door so as to speak to him. The driver then drove off at great speed, dragging the appellant along the road so that he received numerous injuries. The driver was subsequently charged at the magistrate's Court with driving a motor-vehicle while uninsured among other offences. He pleaded guilty to this charge. The appellant thereafter instituted proceedings against the driver for damages for personal injuries and recovered £300 damages, but as the defendant was unable to pay these, the appellant claimed satisfaction of his judgment from the Motor Insurers' Bureau, basing his claim upon an agreement made in 1946 between the Minister of Transport and the Bureau, which provided that “if judgment in respect of any liability which is required to be covered by a policy of insurance . . . under Part 2 of the Road Traffic Act, 1930 (now s. 203 of the Road Traffic Act, 1960) is obtained against any person or persons in Great Britain any such judgment is not satisfied”, then the Bureau will pay the amount of the judgment to the person in whose favour the judgment was given. For the Bureau it was contended that the driver's liability to the appellant was a liability for the consequences of his own wilful and deliberate act and was not required to be covered by a policy of insurance under s. 203 of the Road Traffic Act, 1960.

In his judgment Lord Denning, M.R., said ([1964] 2 All E.R. 746):

“The policy of insurance, which a motorist is required by statute to take out, must cover any liability which may be incurred by him arising out of the use of the vehicle by him. It must, I think, be wide enough to cover, in general terms, any use by him of the vehicle, be it an innocent use or a criminal use, or be it a murderous use or a playful use. A policy so taken out by him is good altogether according to its terms. Of course, if the motorist intended from the beginning to make a criminal use of the vehicle – intended to run down people with it or to drive it recklessly and dangerously – and the insurers knew that that was his intention, the policy would be bad in its inception. No one can stipulate for iniquity. But that is never the intention with which such a policy is taken out. At any rate no insurer is ever party to it. So the policy is good in its inception. The question arises only when the motorist afterwards makes a criminal use of the vehicle. The consequences are then these: if the motorist is guilty of a crime involving a wicked and deliberate intent, and he is made to pay damages to an injured person, he is not himself entitled to recover on the policy. But if he does not pay the damages, then the injured third party can recover against the insurers under s. 207 of the Road Traffic Act, 1960; for it is a liability which the motorist, under the statute, was required to cover. The injured third party is not affected by the disability which attached to the motorist himself. So, here, the liability of Phillips to the plaintiff was a liability which Phillips was required to cover by a policy of insurance, even though it arose out of his wilful and culpable criminal act. If Phillips had been insured, he himself would be disabled from recovering from the insurers. But the injured third party would not be disabled from recovering from them.”

Pearson, L.J., also said (*ibid.* at pp. 749-750):

“The Road Traffic Act, 1960, by s. 206 and ss. 207 confers alternative or independent rights in certain events on the persons to whom the insured has become liable. Public policy should be so applied as not to diminish their rights. It follows that the insurance policy required by the statute has to cover liability arising from any use, even an intentionally criminal use, of the vehicle on a road. The implied provision would merely debar Phillips from recovering an indemnity under his policy even if he had been insured, or it can be said that there is a personal ban. This, the liability of Phillips to the plaintiff was a liability required to be covered by a policy of insurance under the Road Traffic Act, 1960. The agreement applies and the plaintiff is entitled to succeed.”

It seems to me, having regard to the authorities which I have considered in this judgment, that the sole purpose of the Legislature in providing a scheme for compulsory third party insurance is to ensure that any damages that are recovered by an injured third party will be paid by an insurance company. It is not its purpose to provide protection to the driver of a vehicle against having to pay such damages himself. As Diplock, L.J., also pointed out in the *Hardy* case (14) ([1964] 2 All E.R. at p. 752):

“... it was no part of the policy of the Act that the assured’s rights to enforce his own contract against the insurers should constitute the sole measure of the third party’s rights against the insurers, as s. 207 shows. The liability of the assured, and thus the rights of the third party against the insurers, can only arise out of some wrongful (tortious) act of the assured.”

In my view, all that was necessary for the respondents in this case to prove was (1) that the injury to them had been caused by the use of the car on the road;

(2) that they had obtained judgment in respect of such injury and (3) that there was in force at the material time a valid policy of insurance in compliance with the Insurance (Motor Vehicles Third Party Risks) Act, (Cap. 405). The restriction which the insurers purported to put on the class of persons who should drive the car could not, in my opinion, exclude the respondents' independent rights under s. 10 to recover. The restriction was a personal disability of the insured which could debar him alone from recovering indemnity under his policy, but the rights of the respondents were unaffected by it. In my opinion any disregard of the restriction on the user of the vehicle would only entitle the insurers to avoid or cancel the policy vis-à-vis the insured, but the insurers would not be exempted from the liability to a third party which they were required under s. 5(b) of the Act to cover. The liability in respect of which the respondents in this case obtained judgment under s. 10 was one required to be covered under s. 5(b). In s. 10(6) "liability covered by the terms of the policy" is defined as "a liability which is covered by the policy or which would be so covered but for the fact that the insurer is entitled to avoid or cancel, or has avoided or cancelled, the policy". The rights of the third party are curtailed only in the manner specified in sub-ss. 2, 3 and 4 of s. 10 of the Act. It would, therefore, be unfortunate if we were to hold that insurers were free to place further limitations on the rights of injured third parties with the astonishing result that the Act might be rendered nugatory. It is the duty of the court in construing statutes, to find out the mischief which the Legislature intended to remedy and then to construe the legislation in such a way as to achieve that purpose. In *Escoigne Properties Ltd. v. I.R. Comrs.* (15) ([1958] A.C. at p. 565), Lord Denning (as he then was) observed that:

"A statute is not passed in a vacuum, but in a framework of circumstances, so as to give a remedy for a known state of affairs. To arrive at its true meaning, you should know the circumstances with reference to which the words were used: and what was the object, appearing from those circumstances, which Parliament had in view."

And more than 300 years ago it was said in *Heydon's Case* (16):

"For the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law) four things are to be discerned and considered: first, what was the common law before the making of the Act. Second, what was the mischief and defect for which the common law did not provide. Third, what remedy the Parliament hath resolved and appointed to cure the disease of the Commonwealth. And fourth, the true reason of the remedy: and then the office of all the judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and pro privato commodo, and to add force and life to the cure and remedy, according to the true intent of the makers of the act, pro bono publico."

The mischief which existed at the passing of the Act in 1946 was that a third party who was injured by a motor vehicle got no compensation for his suffering and inconvenience, if either the owner or the driver of the vehicle happened to be impecunious. It was then the clear object of the Legislature by the passing of the Act to provide a remedy. Under s. 14 of the Act a vehicle is not licensed for use on a road, unless the person who applies for the licence produces a certificate of insurance which complies with the requirements of the Act. People are therefore entitled to feel assured, as they walk along the streets, that Parliament has protected them against the hazards of motor-accidents, and I think it is

the duty of this court to construe the Act in such a way as to suppress all manoeuvres which tend to frustrate the spirit and policy of the Act.

Therefore, since the use of the car on the road in the particular circumstances of this case was a user covered by a policy of insurance in respect to third party risks which complied with the requirements of the Insurance (Motor Vehicles Third Party Risks) Act, I think that the relevant exception clause does not relieve the defendant company from the liability of satisfying a claim brought under s. 10(1) of the Act.

Consequently, I think the learned trial judge came to the right decision, and I would also dismiss the appeal with costs.

Sir Clement De Lestang JA: I have had the advantage of perusing in advance the judgment of my Lord, the Vice-President and, while I respectfully agree with most of it, I regret having to dissent from his conclusion.

The principal question for decision in this appeal is whether an insurer on a policy of motor insurance, excluding liability when the person driving the vehicle is disqualified from driving, is nevertheless liable to a third party injured whilst the vehicle was being driven by such unqualified person, by virtue of the Insurance (Motor Vehicle Third Party Risks) Act, which I will call “the Act” hereinafter.

This question is of the greatest importance to insurers, insured and third parties alike, and it is surprising that it has not come up for decision by this court before. The answer to it lies in the true construction of a number of provisions of the Act, more particularly ss. 4, 5, 7, 8, 10 and 16 which I shall examine later. It is sufficient at this stage to bear in mind that in construing those provisions regard must be had to the object and history of the Act.

As regards the object, this, as stated in the long title of the Act, is to make provision against third party risks arising out of the use of motor vehicles on the roads. Generally speaking the Act seeks to achieve that object not by placing the whole burden of compensating third parties injured in motor accidents on the insurers but by a combination of two means, namely (1) by making it obligatory, on pain of punishment, for any person who uses or causes or permits any other person to use a motor vehicle on a road, to have in relation to the user of the vehicle a policy of insurance which satisfies the requirements of the Act, and (2) by restricting the right of insurers to avoid liability to third parties. It is the extent of that restriction which must be ascertained in this appeal.

As regards its history the Act was enacted in 1945 and came into operation in 1946. It stems from and follows closely the British legislation on the subject which is to be found in three enactments, namely, the Third Parties (Rights Against Insurers Act), 1930, the Road Traffic Act, 1930 and the Road Traffic Act, 1934. A comparison of the Act with those three British Acts will confirm this and show in particular that ss. 4, 5, 7 and 8 of the Act are close reproductions of ss. 35(1), 36(1), 36(5) and 38 respectively of the Road Traffic Act, 1930 and that ss. 10(1) and 16 of the Act are identical with ss. 10(1) and 12 respectively of the Road Traffic Act, 1934. Between 1930 and 1946 the courts in Britain have had occasion to construe the relevant provisions of the British Acts. They held, as I shall show later, that an insurer could validly limit the cover under a policy and so, in some cases, defeat claims of third parties under the Acts. To obviate this the Motor Insurance Bureau was formed in 1946. Generally speaking it undertook to satisfy judgments obtained by third parties against any person responsible for the use of a vehicle which a policy of insurance purports to cover if that person fails to satisfy the judgment himself. Thenceforth the courts in Britain have not been called upon to consider as between third party and insurer or insured any problems relating to third party insurance but as there is

no organisation in Kenya corresponding to the Motor Insurance Bureau those problems are still very much alive here.

With these preliminary observations I propose to consider the relevant provisions of the Act which I have already mentioned uninfluenced by the British decisions and then to refer to British and local decisions on the matter.

Section 4 of the Act prohibits the use of a vehicle on the road unless the person using it is covered against third party risks. Be it noted in passing that the insurance must cover, not the vehicle but its user on the road.

Section 5 prescribes the kind of cover the person using the vehicle must have in order to comply with s. 4 namely, it must be a policy which, with certain exceptions inapplicable here:

“insures such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of, or bodily injury to, any person caused by or arising out of the use of the vehicle on a road.”

Section 7 deals with certificates of insurance which every insurer must issue to the insured and requires the particulars of any conditions subject to which the policy is issued to be stated therein. There are other provisions in the Act requiring the production of certificates of insurance to police officers on demand and the giving of information to other persons in the event of an accident on the road.

Those sections which I have paraphrased are quite straightforward and do not give rise to any difficulty of construction. Unfortunately the same cannot be said of s. 8, s. 10(1) and s. 16 which must be quoted in full for the purpose of comparison because although they make sense when read separately they are repugnant when read together:

“8. Any condition in a policy of insurance providing that no liability shall arise under the policy, or that any liability so arising shall cease in the event of some specified thing being done or omitted to be done after the happening of the event giving rise to a claim under the policy, shall, as respect such liabilities as are required to be covered by a policy under s. 5 of this Act, be of no effect:

Provided that nothing in this section shall be taken to render void any provision in a policy requiring the persons insured to repay to the insurer any sums which the latter may have become liable to pay under the policy and which have been applied to the satisfaction of the claims of third parties.

10(1). If, after a policy of insurance has been effected, judgment in respect of any such liability as is required to be covered by a policy under para. (b) of s. 5 of this Act (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then, notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.

16. Where a certificate of insurance has been issued under s. 7 of this Act to the person by whom a policy has been effected so much of the policy as purports to restrict the insurance of the persons insured thereby by reference to any of the following matters –

- (a) the age or physical or mental condition of persons driving the vehicle; or
- (b) the condition of the vehicle; or
- (c) the number of persons that the vehicle carries; or
- (d) the weight or physical characteristics of the goods that the vehicle carries; or
- (e) the times at which or the areas within which the vehicle is used; or
- (f) the horse-power or value of the vehicle; or
- (g) the carrying on the vehicle of any particular apparatus; or
- (h) the carrying on the vehicle of any particular means of identification other than any means of identification required to be carried by or under the Traffic Act,

shall, as respects such liabilities as are required to be covered by a policy under para. (b) of s. 5 of this Act, be of no effect:

Provided that nothing in this section shall require an insurer to pay any sum in respect of the liability of any person otherwise than in or towards the discharge of that liability, and any sum paid by an insurer in or towards the discharge of any liability of any person which is covered by the policy by virtue only of this section shall be recoverable by the insurer from that person.”

Construed on its own, literally and grammatically, s. 8 purports to avoid generally any condition in a policy negating liability whether it relates to anything being done or omitted to be done before or after the happening of the great event giving rise to a claim thereunder. The proviso to s. 8 makes it clear that such conditions are of no effect not only against the third party but also against the insured himself. It does not, however, affect a term in the policy itself empowering the insurer to recover from the insured any payment made to a third party by virtue of the section. It will also be noted that s. 8 is not expressly made subject to ss. 10 and 16 or either of them or vice-versa. If this wide construction is put on s. 8 it is difficult to appreciate the need for s. 16, which merely declares to be of no effect certain specified restrictions on the scope of policies, those restrictions being already covered by s. 8. Apart from their scope the only real difference between the two sections lies in the provisos. The proviso to s. 16 restricts the liability of the insurer to the third party but, unlike the proviso to s. 8, empowers the insurer, whether there is a term in the policy or not to that effect, to recover the payment from the insured. Another odd result which would follow from a wide interpretation of s. 8 is that an insured could with impunity break almost any term in an insurance policy and yet escape punishment under the Act because by reason of the avoidance of such term the policy would still cover third party risks in compliance with the requirements of the Act.

It is a well-known rule of construction that if two sections of an enactment are repugnant the last must prevail (*Ward v. Riley* (17), ((1867), L.R. 3 C.P. at p. 27, per Keating, J.). Another well-known rule is that where there are two sections dealing with the same subject matter, one section being general and the other containing qualifications, effect must be given to the section containing the qualifications (*Moss v. Elphick* (18) ([1910] 1 K.B. at p. 478, per Pickford, J.)

Applying those principles it seems to me that s. 16 throws light upon what s. 8, the earlier section, was intended to mean. By prohibiting certain clauses in a policy which restrict the scope of the insurance s. 16 puts beyond doubt in my view that such restrictions were otherwise permissible. Moreover the fact that s. 16 only avoids certain specified restrictions shows conclusively in my view

that restrictions on the scope of the insurance, other than those specified, are permissible. That could only be if the expression “any condition” in s. 8 excluded restrictions on the scope of the insurance. The conclusion is therefore inescapable that s. 8 must be given a narrow and not a wide meaning so that any term in the policy which merely restricts the scope of the insurance will be outside it. The difference of language between the two sections, namely, “any condition in a policy” in s. 8 and “so much of the policy as purports to restrict the insurance” in s. 16 is in my view significant and supports the narrower construction. So also does the difference in the provisos to the two sections. Consider the instant case; the term, to use a neutral word, in the policy that the use of the vehicle is not covered when the driver is disqualified from driving, though outside s. 16, would come within the wide construction of s. 8. Although this term deals with a much more serious matter than most of the restrictions specified in s.16, the proviso to which provides redress against the insured, yet the insurer in the instant case would have no redress against the insured by virtue of the proviso to s. 8 *only*. This is to say the least odd, and is a pointer, I think, to the true construction of s. 8. It shows that s. 8 deals with terms other than restrictions.

I think it is a rule of construction that when a law which has received judicial interpretation is enacted without change it will be presumed that the legislature which enacted it was aware of the construction given to it at the time of the enactment and intended it to bear that construction. Consequently since the Act which was enacted in Kenya in 1945 was, as I have shown, taken from British legislation on the subject it may be helpful to ascertain the construction placed upon the provisions with which we are concerned by the courts in Britain. I do not propose to make extensive quotations from British decisions but merely to set out their effect and then refer to a few cases. From a study of a number of pre-1946 cases it seems to me that the courts in Britain have consistently held that an insurer was not liable to a third party injured as a result of a motor accident if the use of the car was not covered by the policy at the time e.g. where the driver of the vehicle was unlicensed or disqualified or where the vehicle was used otherwise than for private purposes and the policies excluded such driving or user as the case may be. They appear to have arrived at their decision by construing s. 38 of the Road Traffic Act, 1930 (s. 8 of the Act) as merely preventing the rights which third parties might acquire under the Act from being defeated by some breach of conditions on the part of the assured committed after his liability to the third party had been incurred. In other words they read the words “in the event of some specified thing being done or omitted to be done after the happening of the event giving rise to a claim under the policy” as governing both “no liability shall arise under the policy” and “any liability so arising shall cease”. I pause here to say that I agree with my Lord, the Vice-President that having regard to the position of the comma in s. 8 this construction is neither grammatical nor logical and should not be adopted unless there is no other reasonable interpretation consonant with the other provisions of the Act.

It was only after the firm adoption of this construction by the British courts that s. 10(1) and 12 of the Act of 1934 (ss. 10(1) and 16 of the Act) were enacted. Those sections were clearly intended to fill some but not all of the gaps in the law as it was then understood. So at the time of the enactment of the Act the position in Britain under the parent Acts was that insurers remained free to restrict the scope of the insurance but were precluded from relying on certain terms of the policy, namely, conditions the breach of which had the effect of avoiding liability after it had arisen (s. 38, Road Traffic Act, 1930; s. 8 of the Act) and restrictions on the scope of the policy specified in s. 12 of the Road Traffic Act, 1934 (s. 16 of the Act). Consequently in Britain the enactment of

s. 10(1) and s. 12 of the Act of 1934 confirmed, so to speak, the interpretation, which the courts had placed on s. 38 of the 1930 Act.

I shall now refer to a few decisions of the English courts. In *Bright v. Ashfold* (16) there was a condition in the policy relating to a motorcycle that the insurer would not be liable if a passenger was carried otherwise than in a side car. An accident having occurred while a passenger was being carried on the pillion seat without a side car being attached to the motorcycle, the insured was charged with using a motor vehicle on a road without there being in force in relation to the user of the vehicle such a policy of insurance in respect of third party risks as complied with the Road Traffic Act, 1930. The justices dismissed the information on the ground that the condition in the policy was of no effect by reason of s. 38 of that Act and that therefore the policy of insurance was in force on that occasion. On appeal to the Divisional Court it was held that s. 38 did not apply and that consequently there was no policy in force. Lord Hewart, C.J., delivering the judgment of the court said:

“This was a condition which circumscribed the operation of the policy from the beginning. There was, therefore, no policy of insurance against third party risks at all in force in relation to the use of the motorcycle by the respondent, when a passenger was being carried otherwise than in a side car.”

In *Gray v. Blackmore* (7) it was a term of the policy that the insurer was not liable when the car was being used for trade purposes. It was held that s. 38 does not avoid a condition limiting the cover in the policy: it merely prevents an insurer escaping liability to a third party by reason of some act or omission of the assured after the claim has arisen. Similar decisions were given in *Wyatt v. Guildhall Insurance Company Ltd.* (19), where there was a term that the insurer was not liable when the car was used otherwise than for social, domestic or pleasure purposes; and in *Bonham v. The Zurich General Accident Insurance* (20) where liability was excluded when passengers were being carried for hire or reward. See also to the same effect *Howarth v. Dawson and Others* (21). In *Herbert v. Railway Assurance Company* (22) the policy provided that the insurers would not be liable in respect of any accident incurred when the motorcycle was being driven by anyone other than the insured himself. An accident occurred while it was being driven by a friend of the insured. It was held that the user of the motorcycle at the time of the accident was not covered by the policy, and that s. 10 did not impose liability on the insurer in a case where he has limited his liability by the wording of the policy but only in a case where there is an apparently valid policy covering the liability which yet they could have avoided or cancelled.

The relevant provisions of the Act were also considered by the courts in East Africa, and there are four reported cases. In the three later cases, namely, *Ramadhani Ali v. R.* (23), *Alamanzane Kakoza v. R.* (18) and *R. v. Amani Marunda* (19) the High Courts of Uganda and Tanganyika adopted the interpretation placed upon s. 38 by the courts in Britain and I think rightly. In the case of *Harnam Singh v. R.* (10), the Supreme Court of Kenya in its appellate jurisdiction gave s. 8 the wide interpretation which it can only bear when read on its own. The court was not referred to any decisions of the British courts and did not consider the effect of s. 16 of the Act. In that case liability under the policy was excluded when the vehicle was being driven by an unlicensed driver. The vehicle was driven by a person who had neither a certificate of competency nor a licence. He was charged inter alia with riding a motorcycle without a valid third party policy of insurance. It was held that having regard to s. 8 and s. 10(1) the driver held a valid policy of insurance because the insurer would have been liable to a third party under s. 8, and he had committed no offence. This

case illustrates in my view the danger of such a wide construction of s. 8 since it exonerates an assured who is obviously at fault.

To sum up I have endeavoured to show that the courts in Britain at the time the Act was enacted here construed s. 38 of the Road Traffic Act, 1930 (s. 8 of the Act) in a narrow sense and as excluding terms in a policy restricting the scope of the cover. I have also tried to show that if the Act is examined by itself, unhindered by decisions of the British courts, s. 8 must be given a similar narrow construction. I must now consider whether the limitation on liability in the instant case is a restriction on the scope of the cover or not. I do not propose to repeat the relevant provisions of the policy of insurance which are sufficiently set out in the Vice-President's judgment. Whether a term in a policy is an exception, restriction or a condition does not depend on the label placed on it by the policy but rather on its true effect, regard being had to the policy as a whole. It so happens that in the present case this limitation is to be found under the heading "Exceptions" in the policy. The exception states that the company (insurer) shall not be liable in respect of any claim arising while the motor vehicle is being driven by or is for the purpose of being driven by him in the charge of any persons other than an authorised driver. An authorised driver is, for the purpose of this case, defined in the schedule to the policy, as any person driving with the insured's permission provided he is not disqualified from driving. It seems to me that the insurers have made it quite clear that they will cover the insured only when the person driving his vehicle is not disqualified and that this is a restriction on the scope of the cover and nothing else. Restrictions in similar terms have been interpreted in the cases decided by the courts in Britain which I have quoted as limiting the scope of the policy and of having the effect of avoiding the policy ab initio.

It seems to me, therefore, that in the present case the insurer would not be liable to the third party unless the avoidance clause in the policy so made him. On the effect of that clause I am in entire agreement with the views of my Lord, the Vice-President. I would accordingly allow this appeal.

Appeal dismissed.

For the appellant:

Daly & Figgis, Nairobi

A. E. Hunter

For the respondent:

MacDougall & Wollen, Nairobi

P. J. Ransley

**Re an Application by the General Manager of the East African Railways and
Harbours Administration**
[1966] 1 EA 110 (HCK)

Division: High Court of Kenya at Nairobi

Date of judgment: 15 December 1965

Case Number: 78/1965

Before: Rudd and Miller JJ
Sourced by: LawAfrica

[1] Certiorari – Motion to quash award of Industrial Court – Trade dispute between General Manager and Railway African Union (Kenya) – Whether General Manager a proper party to Industrial Court proceedings.

[2] Railway – Position in Kenya of General Manager considered in relation to other entities of the East African Common Services Organisation – East African Railways & Harbours Administration Act (Cap. 3, Laws of E.A. High Commission, Revised Edition, 1951), s. 4.

[3] Industrial disputes – Award of Industrial Court challenged by certiorari – Competence of party before Industrial Court affecting its award.

Editor's Summary

As a result of a trade dispute on a number of issues including terms of service between employees working in the East African Railways and Harbours Administration (called “the Administration”) and the Administration a reference was made by agreement to the Industrial Court. After a protracted hearing the Industrial Court made an award which was the subject of these proceedings. The objection to the award by the General Manager was that he was not cited as nor was he a proper party in the Industrial Court and consequently was not bound by the award. The Administration had been cited though it had no legal corporate existence. The General Manager contended that the employees concerned were employed in the service of the East African Common Services Organisation (called “the Organisation”) by virtue of s. 2 of the East African Railways and Harbours Act. Nevertheless s. 3(1) of the East African Common Services Organisation Act (Cap. 4, Laws of Kenya) together with art. 3 and the first schedule of the Constitution of the Organisation conferred on the East African Common Services Authority (called “the authority”) the legal personality and authority which the Industrial Court purported to find in the Administration. Neither the Administration as such nor the Organisation had any legal personality and the Authority should have been the proper party. It was argued for the Industrial Court and the Railway African Union that the General Manager had authority to bind the legal employer of the Union's members, that the General Manager could sue and be sued and was himself bound by the award and had submitted to the jurisdiction of the Court.

Held –

- (i) the formal defect of not including the words “General Manager” in the citation before the Industrial Court was cured by the General Manager joining issue with the Union, in that he or his agents made the necessary reference by which the Industrial Court became legally seized of the dispute;
- (ii) the Kenya Government's right to legislate for Kenya with respect to matters connected with the Organisation's service, including the Administration, had been preserved;
- (iii) the control and executive management of the Administration was vested in the General Manager who, in common with the Authority, had a legal personality for purposes of suing and being sued, whereas the Organisation had no such personality;

- (iv) since the special fund kept by the Organisation for the purposes of the Administration could be charged for the payment of salaries and wages by the

General Manager by an Appropriation Act of the Central Legislative Assembly or by an order of the Court directed to the General Manager, he was a proper party and was bound by the award of the Industrial Court.

The Court's discretion to quash the Award refused.

No cases referred to in judgment.

The following judgments were read:

Judgment

Rudd J: This is a Motion brought by the General Manager of the East African Railways and Harbours Administration for an Order of Certiorari to quash an award made by the Industrial Court in proceedings arising out of a trade dispute and brought before the Industrial Court on the joint application of the said General Manager as being or representing the employer and the Railway African Union (Kenya) as representing certain employees working in Kenya in the East African Railways and Harbours Administration on the ground that the said General Manager was not in law the employer of the said employees.

In this judgment I shall refer to the said general manager as the "General Manager" and to the said administration as the "Administration".

The factual background can be stated shortly as follows: Early in 1965 a trade dispute arose between the employees and the Administration. This dispute was not settled by agreement and strike action was threatened. In fact some of the employees actually went on strike for a time, but the strike was officially cancelled and called off as a result of an agreement signed on behalf of the General Manager by an agent and by representatives of the Union on behalf of the employees. Under this agreement the issues in dispute were to be referred for decision to the Industrial Court.

The issues were accordingly referred to the Industrial Court and after a protracted hearing that court made the award which the General Manager now seeks to have quashed. After the Industrial Court made this award an application was made to it on behalf of the General Manager for an order interpreting the award. The main basis of this application was the contention that the General Manager was not a proper party, that he was not the employer of the employees concerned and that the real employer was the East African Common Services Organisation, which I shall call "the organisation". The Industrial Court held that the General Manager was a proper party and that he was bound by the award. It may perhaps be worthy of mention that I understand that in the proceedings before the Industrial Court the case for the employer was conducted by the Legal Secretary of the Organisation or members of his staff and the motion before this court was argued on behalf of the General Manager by the said Legal Secretary himself, who is the responsible legal adviser for both the Organisation and the Administration. It should also be noticed that whereas the most important issue before the Industrial Court was probably in relation to terms of pay and minimum salary or wages, there were other issues which included alleged victimisation in connection with the transfer of certain employees and the operation of the industrial relations machinery in the Administration with which the General Manager is necessarily concerned, since he is by s. 3(3) of the East African Railways and Harbours Act responsible for the control and executive management of the Administration, subject to any direction that may have been given to him

by the Organisation through the East African Common Services Authority, which I shall call “the Authority”. There

is nothing to indicate that any relevant special directions were given to the General Manager by the Authority so as to fetter or control his acts in these matters.

Neither the Administration nor the Organisation has any sort of individual legal personality. They are not legal persons. The chief executive authority of the Organisation is the Authority consisting of the principle elected minister of Government of each of the three Territories concerned. The Authority is a body corporate by s. 3 of the East African Common Services Act and can sue or be sued. There are ministerial committees of the Organisation which have executive powers, but such ministerial committees do not appear to have been endowed with any distinct legal personality.

The Administration is a self contained service administered by the Organisation on behalf of the Governments of the territories and this service is constituted by and functions under and in accordance with the provisions of the East African Railways and Harbours Act of the former High Commission, subject to later amendments.

By s. 3(3) of this Act the control and executive management of the Administration is vested in the General Manager subject to any directions by the Organisation as to the exercise and performance by him of his functions under the Act.

By s. 4 the General Manager is made a corporation sole and may sue or be sued as such.

By s. 2 employees are persons in the service of the Organisation and employed in the Administration.

In these circumstances it is not difficult to understand that it may be difficult at first sight to say what person or authority should be treated as the employer of persons working in the Administration. The Organisation has no distinct legal personality, the Authority has a corporate personality in law and may sue or be sued and has power to acquire, hold, manage and dispose of land and property, but it does not control finance and expenditure in relation to the Administration which is a self contained service.

Employees working in the Administration are paid by the Administration from its funds, that is to say, the General Manager is ultimately responsible for the payment of wages and salaries. Such employees are appointed by a special Service Commission whose terms of reference are limited to service in the Administration, though technically they are appointed by this Public Service Commission for the Organisation. In my view this is the effect of s. 85 of the East African Railways and Harbours Act read with art. 40 of the Constitution of the Organisation.

As the Administration is a self contained service there is a separate fund of the Organisation which is kept for the Administration and into which the revenues of the Administration are paid and from which expenditure in respect of the Administration shall be paid out; vide art. 34 of the Constitution of the Organisation.

The legislative authority of the Organisation is the Central Legislative Assembly. Expenditure is controlled by the Central Legislative Assembly in the sense that annual estimates have to be submitted to the Assembly and authorised by an Appropriation Act. Where circumstances so require supplementary estimates can be submitted and supplementary Appropriation Acts passed; see art 35. Moneys charged upon the fund by Act of the Organisation need not be included in an Appropriation Bill; see art. 35. This provision applies to Acts of the former High Commission so long as they are in force.

Part III of the East African Railways and Harbours Act contains further financial provisions. Salaries and wages are not charged on the fund, but if they are embodied in a decree or order of a court they

become charged on the

fund and by s. 94 the General Manager shall cause to be paid out of the fund such amounts as may by order of a court be awarded against the General Manager to the person entitled thereto.

There can be no doubt but that wages and salaries are payable only out of the special fund and not out of any other fund. The General Manager is ultimately responsible for such payments. They are paid by him. He is the person who should be sued if court action becomes necessary. General authority by means of an Appropriation Act is necessary if there is no court order or decree, but this is a matter of machinery only. If sufficient appropriation is not authorised and is refused employees could certainly, in my opinion, proceed by action against the General Manager and if a decree is obtained it is enforceable and must be paid from the fund notwithstanding any insufficiency of appropriation.

I have now established that neither the Organisation nor the Administration is endowed with separate legal personality. The Administration is a service of the Organisation, but in respect of that service the General Manager is endowed with a legal corporate personality and can sue or be sued. He is an officer of the Organisation and a person who can be sued in respect of the Administration. The Authority though capable of being sued is not the Organisation, it is only the chief executive authority of the Organisation and as regards matters affecting the Administration I do not think that it is a more appropriate party to put forward the Administration's case than the General Manager in the proceedings before the Industrial Court. For these reasons I am of opinion that the General Manager was a proper party in the proceedings before the Industrial Court. I am not satisfied that he was not such an appropriate party.

It is difficult in view of the status and other high responsibilities of the members of the Authority to believe that the Authority itself is the appropriate body to decide on matters as to terms of service of menial employees working in the Administration, since such matters are relatively very minor matters when contrasted with the high responsibilities of the members of the Authority. No doubt, if it wished, the Authority could actively concern itself in such matters, but there is no evidence that it has ever done so and I consider it unlikely that it should do so.

Under art. 6, para. 2 of the Constitution of the Organisation the Authority may delegate any of its functions to an officer of the Organisation for dispatch of business at times when the Authority is not meeting. The General Manager is an officer of the Organisation, but this court has not been informed one way or the other as to whether any such delegation has been made in respect of the matters in question in this motion. Possibly in view of s. 3 of the East African Railways and Harbours Act whereby the General Manager is required to provide services and facilities by means of the Administration and is vested with powers of executive management, such a delegation would not be necessary. The services and facilities required to be provided entail the use and management of staff and, to some extent, require consideration and determination of the terms of service of staff. This court has not been informed as to whether there are in existence regulations affecting staff and whether under such regulations, if they exist, as I think is likely, responsibility is placed on the General Manager or other authority.

Even if it were the fact that the Authority was a more appropriate party I do not think that that fact would justify the quashing of the Industrial Court's award on this application which is an application by the General Manager. Certiorari is always discretionary. The General Manager, through his agent, was a willing and active party to the submission of the dispute to the Industrial Court. He or his representatives actively prosecuted the Administration's case in the course of the proceedings and in the circumstances. I do not consider

that this application by the General Manager should be allowed to succeed in view of his conduct and unambiguous submission to the jurisdiction of the Industrial Court in this matter in which, as an officer of the Organisation and General Manager of the Administration, he was closely concerned.

For these reasons I would dismiss the application with costs to the Industrial Court and the Union.

Miller J: This is a motion brought by the General Manager of the East African Railways and Harbours Administration for an order of certiorari to quash an award made by the Industrial Court on July 3, 1965.

As a result of a trade dispute between certain employees of the East African Railways and Harbours in Kenya and the General Manager of the said East African Railways and Harbours hereinafter referred to as the “General Manager”, representatives of the Railway African Union (Kenya) and representatives of the General Manager made joint application to the Industrial Court referring the dispute to that court in manner and for the purposes prescribed by s. 9(4) of the Trade Disputes Act (No. 15 of 1965).

The Industrial Court inquired into the dispute and having made its award an application was made to it for interpretation of the said award under the provisions of s. 10 of the Trade Disputes Act (No. 15 of 1965). The application was made on behalf of the General Manager seeking to show that the General Manager was not the employer of the employees in the dispute but rather that the employer and appropriate party to the inquiry before the Court was the East African Common Services Organisation, hereinafter called the “Organisation”. The Industrial Court held that the General Manager was the proper party to the proceedings and that he was bound by the award.

The General Manager now applies to this Court to have the said award brought up and quashed on the grounds that “the Industrial Court acted in excess of its jurisdiction under s. 9(4) of the Trade Disputes Act (No. 15 of 1965) in that it purported to make an award affecting the East African Railways and Harbours Administration being a body having no legal corporate existence and unable in law to be made a party before the Industrial Court or be affected or bound by its award”.

The Legal Secretary of the East African Common Services Organisation as counsel for the General Manager, contended that by virtue of s. 3(1) of the East African Common Services Organisation Act (Cap. 4, Laws of Kenya), art. 3 of the Constitution of the Organisation and the First Schedule of the said Act, the Government of Kenya conferred upon the East African Common Services Authority (hereinafter referred to as the “Authority”) the legal personality and authority which the Industrial Court purported to find in the East African Railways and Harbours Administration.

These provisions are as follows viz.:

(1) Section 3(1) –

“The Authority shall have the capacity within Kenya of a body corporate with perpetual succession, and shall have power to acquire, hold, manage and dispose of land and other property and to sue and be sued in the name of the Authority.”

(2) Article 3 of the Constitution of the Organisation –

1. “The principal executive authorities of the Organisation shall be – (a) The East African Common Services Authority; (b) four Ministerial Committees and those authorities are hereby established.

2. Nothing in this Article shall preclude the establishment of subordinate authorities of the Organisation.
- (3) First Schedule –
Services to be administered by the Organisation –
 1. The East African Railways and Harbours Administration.
 - ...

Counsel for the General Manager also pointed out that although the General Manager has been made a corporation sole by s. 4 of the Railways and Harbours Act his authority has been expressly limited in the First Schedule to the said Act.

Section 4 of this Act provides:

“For the purposes of this Act the General Manager shall be a corporation sole by name of the General Manager of the East African Railways and Harbours Administration, and in that capacity the provisions set out in the First Schedule shall have effect.”

Without reproducing the provisions of the First Schedule to the East African Railways and Harbours Act it is enough at this stage to observe that whereas the legal status of the Authority relates to its capacity, the legal status of the General Manager relates to capacity and also involves specific duties.

Counsel for the General Manager finally submitted that in the light of the statutory provisions referred to above the Organisation was the proper party to the proceedings before the Industrial Court and that at all events the Authority is the legal employer of the employees since the Authority is a Government Authority within the meaning of the term “Employer” in s. 2 of the Trade Disputes Act (No. 15 of 1965).

For the Industrial Court and the Railway African Union (Kenya) it was argued that the Industrial Court had jurisdiction to inquire into the dispute and make its award, that the General Manager had authority to bind the legal employer of the workers represented by the Union, that the General Manager was himself bound by the Industrial Court’s award and interpretation thereof, that the General Manager having submitted to the jurisdiction of the Industrial Court he should not be heard to say that the said Court had no jurisdiction to entertain the dispute and direct its award against him; and that at most the citing of the East African Railways and Harbours Administration before the Industrial Court can amount to no more than a misdescription if at all; and as such this court ought not to exercise its discretion in making the order of certiorari.

This matter involves the interpretation of the relevant statutory provisions and I proceed to examine them.

The East African Common Services Organisation Act (Cap. 4), Laws of Kenya) makes provision for giving effect to certain provisions of the East African Common Services Agreement entered into by the Governments of the East African Territories parties to the Agreement.

No legal authority has been given to the Organisation but the Act provides that the Authority established by art. 3 of the Constitution of the Organisation shall have the capacity of a body corporate within Kenya (vide ss. 2 and 3 of the Act).

It is important to note that while vesting the Authority with power to perform the functions conferred upon it by the Constitution of the Organisation in s. 3(2) of the Act, the next following subsection (3) expressly limits the powers of the Authority thus:

“The provisions of sub-s. (2) of this section relate only to the capacity of the Authority as a body corporate and *nothing in that subsection shall be*

construed as authorising the disregard by the Authority of any written law or the affecting any power of the Authority conferred by any written law.”

By these latter provisions I am of opinion that even although there might be instances of concurrence and agreed action by the Government of Kenya and the Organisation in relation to the functions of the Authority within the limits of its vested capacity, the Kenya Government’s right to legislate for Kenya with respect to matters connected with the local administration of the Organisation’s Services has been preserved. The Kenya legislature must therefore be taken to have contemplated these matters when it enacted the Trade Disputes Act (No. 15 of 1965) consolidating inter alia the law relating to trade disputes in essential services and the setting up of the Industrial Court. For the purposes of this Act “Essential Services” include “Public Transport Services *provided* by the East African Railways and Harbours Administration” – vide the First Schedule to the Act; and “The East African Railways and Harbours Administration” is one of the Services to be *administered* by the Organisation – vide First Schedule of the East African Common Services Organisation Act (Cap. 4, Laws of Kenya).

The term “East African Railways and Harbours Administration” occurring as it does in the two Acts referred to immediately above I now turn to the legislative history and relevant provisions of the East African Railways and Harbours Act.

In 1961 the original s. 4 of this Act was replaced by that reproduced above and although the General Manager replaced the Commissioner with the same duties as detailed in the First Schedule of the Act, the word “Administration” is now expressly introduced. This was a necessary and consequential amendment having regard to the express objects and reasons set out in the preceding s. 3 of the Act and in which section the co-related intention of the legislature in the East African Common Services Act (Cap. 4) has been made clear.

The section provides:

“Section 3(1). With a view to providing a co-ordinated and integrated system within the Territories of:

- (a) rail and inland waterway transport services; and
- (b) harbour facilities;
- (c) auxiliary road services and costal transport services in connection therewith

it is hereby declared that *it shall be the duty of the General Manager to provide such a system, in accordance with the provisions of this Act by means of the East African Railways and Harbours Administration.*

- (2) The High Commission may give to the General Manager directions as to the exercise and performance of his functions under this Act, and the General Manager shall give effect to such directions.
- (3) Subject to the provisions of sub-s. (2) *the control and executive management of the Administration shall be vested in the General Manager.”*

It will be observed that as opposed to the “capacity” of the Authority the General Manager has been given the express statutory duty of the control and executive management of the East African Railways and Harbours Administration, a matter which was envisaged in para. 2 of art. 3 of the Constitution of the Organisation, contemplated in s. 3(3) of the East African Common Services Organisation Act (Cap. 4) and in no way repugnant to the provisions of s. 7(1) of the said Act, read in conjunction with s. 6(1) and (3) of the Constitution of Kenya (Amendment) Act (No. 14 of 1965).

For these reasons I hold that the General Manager, who is legally responsible

for the control and executive management of the East African Railways and Harbours Administration, was the proper party to the proceedings in the Industrial Court since the members of the Union are employees of the Organisation and he is legally responsible for the Administration of their employment – see First Schedule East African Railways and Harbours Act.

I have noted the fact that the words “General Manager” were not included in the citation before the Industrial Court, but I consider that the General Manager cured this formal defect by joining issue with the Union, in that through his representatives he made the necessary statutory application by which the Industrial Court became legally seized of the inquiry.

I therefore hold that the order of certiorari should not be made.

The application is dismissed with costs to the Industrial Court and the Union.

The Court’s discretion to quash the Award refused.

For the applicant:

The Legal Secretary, E.A. Common Services Organisation

A. M. Akiwumi and Kakuli (Legal Secretary and Asst. Legal Secretary (E.A.C.S.O.))

For the Industrial Court:

The Attorney-General, Kenya

K. Potter, Q.C. and Kivitu (Special Legal and Constitutional Counsel and State Attorney, Kenya)

For the Railway African Union Kenya:

Hamilton, Harrison & Mathews, Nairobi

Sir William Lindsay

**Narali Museraza (a minor by his next friend) Mohamedtaki A P Champs v
Mohamedali Nazerali Jiwa and others**
[1966] 1 EA 117 (HCK)

Division:	High Court of Kenya at Mombasa
Date of judgment:	27 November 1964
Case Number:	141 (os)/1964
Before:	Wicks J
Sourced by:	LawAfrica

[1] Mohammedan law – Will – Testator disposing of one-third willable estate – By subsequent codicil testator makes a further bequest – Whether latter bequest in addition to the one-third.

Editor's Summary

A testator referred in his will to the rule whereby as a Mohammedan he could dispose of only a third of his estate and purported to dispose of that third. By a subsequent codicil he made a bequest of a sum of Shs. 50,000/- to the applicant for his maintenance and education but the respondent executors refused to pay whereupon the applicant took out an originating summons claiming this amount. It was contended on behalf of the respondents that as Mohammedan law applied the bequest to the applicant made in the codicil, being in addition, exceeded the willable one-third and was void. On the other hand, it was argued for the applicant that as the testator was a member of the Khoja Shia Ithnasheri the law applicable was Hindu law under which the testator could validly dispose of the whole of his estate. In the alternative it was further argued that the codicil was to be read with the will and that the bequest was to come out of the one-third willable estate.

Held –

- (i) the law governing succession and inheritance among Ithnasheri Khoja in the Coast Region of Kenya is the Mohammedan law of succession and that law governed the distribution of the estate of the deceased;
- (ii) looking at the codicil as a whole the court was satisfied that by the words “in addition to this Will” the testator intended that the codicil was to be read with

the will and by the words “the following addition to it” the testator intended to add to the provisions of his will; therefore,

- (iii) it was the intention of the testator that the bequest of Shs. 50,000/- was to come out of the one-third willable estate.

Order accordingly. Costs to be borne by the estate on solicitor and client basis.

Cases referred to in judgment:

- (1) *Shubana Binti Juma v. The Administrator-General* (1927), Z.L.R. 51.
- (2) *In re Hassanali Jadavji* (1947), 1 T.L.R. (R.) 729.
- (3) *Freeman, Hope v. Freeman*, [1910] 1 Ch. 681.

Judgment

Wicks J: This application arises out of the Will and Codicil made by one Nazerali Jiwa deceased. The respondents are executors of the Will and Codicil and the applicant claims that by the Codicil Shs. 50,000/- was directed to be paid to him for his maintenance and education and the respondents have failed to pay this sum.

The deceased was a Muslim, a member of the Khoja Shia Ithnashari and the respondents claim that as such, Mohammedan law applies and under that law a testator can dispose of by will up to one-third of his estate only, that the deceased disposed of one-third of his estate by his Will and the bequest to the applicant made in the codicil, being in addition, exceeds the one-third and is void. The applicant contends that the law governing the Khoja Ithnashari is Hindu law under which a testator can dispose of the whole of his estate by will and the bequest contained in the codicil is valid. The applicant concedes that by usage Khoja Ithnasharis can abandon their old law and adopt Mohammedan law, but says that whether they have done so or not is a question of fact and it has not been established in Kenya that the Khoja Ithnasharis have adopted Mohammedan law. The applicant says further that if it is established that Mohammedan law is applicable then the bequest to the applicant comes within the disposable one-third of the deceased's estate and is valid.

There are two issues, first, what is the law of succession and inheritance of Khoja Ithnasharis in Kenya? and if the answer is Mohammedan law, then a second issue arises and that is as to whether or not the bequest to the applicant results in the testator having attempted by his will to dispose of more than one-third of his estate?

On the first issue there is the Zanzibar case of *Shubana Binti Juma v. The Administrator-General* (1). In this case Doorly, J., has set out in his judgment a careful analysis of the history of the Ithnashari Khojas related to the law of succession and inheritance and I do not propose to repeat that. In considering the facts Doorly, J., referred to the administration records that had been put in by the parties and came to the conclusion:

“The oral evidence in this case, taken with the fact that the Mohammedan Law, both in respect of wills and in respect of intestacies, has been applied in more cases than the Hindu Law, and specially the fact of 30 wills made since 1919, 21 are in accordance with Mohammedan Law and only nine in contravention thereof, satisfies me that the time has now arrived when the practice of the majority of the Ithnashari Khojas of

Zanzibar of making their wills so that the devolution of their estates follows the Mohammedan Law amounts to a giving up of the original Hindu custom with which they were connected, and that this Court should no longer uphold that original custom.”

The same issue was considered in Tanganyika in *In re Hassanali Jadavji* (2), in

which Graham Paul, C.J., referred to and accepted the analysis of Doorly, J., in *Shubana Binti Juma's* case (1). Again the administration records were referred to and it was found that the Ithnasheri Khojas in Dar-es-Salaam have never disposed of their property according to Hindu Law, but always according to Mohammedan law. In the case before me no less than 23 sets of administrative records, extending over a number of years, were put in evidence. Of these 17 were of intestacies and six of wills and in every case, whether it be intestacy or will, distribution of the estate was made, or intended to be made, in accordance with Mohammedan law. This being so I find that the law governing succession and inheritance among Ithnasheri Khojas in the Coast Region of Kenya is the Mohammedan law of succession, and that law governs the distribution of the estate of the deceased.

The law governing the administration of the estate of that deceased being Mohammedan law, the second issue falls to be decided, and that is whether or not the bequest to the plaintiff results in the testator having attempted to dispose of more than one-third of his estate? This could be expected to be a matter of account only, but in this case the problem is made difficult. The relevant provisions of the will are:

- “(1) My religion is Khoja Shia Ithnasheri (Mohammedan).
- (6) By this I recommend my trustees that after my death my property shall be disposed of as follows.
- (7) After my death all my debts shall be paid from my property and thereafter reasonable expenses shall be incurred for my funeral and other ceremonies and marriage expenses of my unmarried sons and daughters shall be paid from that. The remaining property shall be disposed of in the following way.
 - (a) If according to Khoja Ithnasheri law duty is payable then it shall be paid.
 - (b) All my shares in the above-mentioned companies shall be retained by the trustees in their names as my trustees for five years from my death, in the meantime only the income of these which is reasonably necessary shall be distributed amongst my heirs. After five years my trustees shall distribute the above-mentioned shares amongst my heirs according to Sheria (Moslem law) of Shia Ithnasheri Sect. The shares of the share of my heirs who are minors and their shares in my other properties shall be managed by my trustees by obtaining the rights as guardian of the minor heirs and making legitimate income according to Sheria and give for their maintenance.
 - (c) After my death out of all the buildings and plots in my name, buildings or plots worth about one hundred thousand shillings shall be kept apart and the income out of this shall be given to my wife Koolsumbai and my daughter Mariambai and my daughter Kaniz Fatma for their maintenance.
 - (d) All other shares of mine other than those shares mentioned in para. (5) shall be managed as mentioned in para. 7(b).
 - (e) According to Sheria (Moslem law) of Shiah Ithnasheri Sect my entitlements is one-third, that amount is mine and from it the trustees shall keep aside reasonable amount for the maintenance of the three that is my wife by name Koolsumbai and my daughter by name Mariambai who is invalid and Kaniz Fatma. After that if there is any balance immovable property of that amount or by other investment legitimate income according to

Sheriah (Moslem law) shall be made and this income shall be given to my sons and daughters and in the family of Sheriffbhai and Jerajbhai if it is necessary and the remaining income shall be given up to Jivabhai, Dahibhai, Sheriffbhai, Hirjibhai and Jerajbhai orphanage trust and it shall be made useful in the running of the orphanage.

- (11) Over and above the powers of trustees according to law I give them the following powers:
- (a) Of my heirs if any son or daughter converts from the religion of Shiah Ithnasheri Sect into Khoja Ismaili or any other religion or marries outside the community of Khoja Shiah Ithnasheri or marries against the wishes of the trustees then that heir or heirs shall be completely rejected by the trustees from inheritance.
 - (b) If it appears to my trustees that someone from my heirs has done some act or there is likelihood of doing such act which is injurious to the prestige of my community or my family then until they think fit they can stop the giving of shares to their heirs or reject completely from the inheritance.
- (12) Any ornaments, cash or other immovable or movable property which my wife or my sons or daughters have received or will receive during my lifetime will be considered as their personal property.”

It is seen that the testator states that he is Khoja Ithnasheri, Mohammedan, and that the Mohammedan law of succession is applicable in his case is confirmed in para. 7(e) where the testator refers to the rule that as a Mohammedan he can by will dispose of a third of his estate only. The testator then purports to dispose of that third. To this point there is no difficulty but looking at the opening words of para. (7) the testator appears to be making dispositions of his estate before he makes dispositions from the one-third that he is entitled to dispose of by will. Such a position was considered by Doorly, J., in *Shubana Binti Juma's case* (1):

“This statement of opinion (that the law governing succession and inheritance among Ithnasheri Khojas in Zanzibar is Mohammedan law) requires to be modified in one respect, viz.: that the practice has grown up among the Ithnasheri Khojas of disposing of the whole of their property by will, but in such a way that the effect is the same as if they had conformed strictly to the Mohammedan Law of wills and disposed of only one-third of their property leaving two-thirds to be divided among their heirs according to Mohammedan Law.

It has been argued by Mr. Sualy that this disposition of the whole property by will is a recognition of their right to make disposition of their property by will according to Hindu custom and contrary to Mohammedan Law.

It may (and it probably is) true that this practice has grown up in order to prevent the possibility of two-thirds of the testator's estate being divided according to Hindu law; but what other course could an Ithnasheri Khoja pursue who knows that the Court held him to be subject to Hindu Law on intestacy? He had to dispose of all his property if he wished to prevent this and to sustain Mohammedan Law.

To say that a disposition by will of one-third of the testator's property according to his choice and of the remaining two-thirds to his heirs according to the Law of Islam is contrary to Mohammedan Law is a proposition which appears to me to be merely technical and based only on a consideration of the letter and not the spirit of the Mohammedan Law.

I am strengthened in this conclusion by the four wills of Arabs put in by Mr. Hasan for the plaintiff in which the whole property is disposed

of by will in such a way that the distribution of the property is the same as if the testator had been intestate in regard to two-thirds of his property. These Arab testators are pure Mohammedans and no question of a law other than the Law of Islam has any application to their testamentary dispositions or capacity."

The same reasoning applies here. There being no decision on the point in Kenya it is reasonable to expect that an Ithnasheri Khoja would take the same precautions as did Ithnasheri Khojas in Zanzibar. The position then is that, as far as the two-thirds of the estate which a testator cannot dispose of by will is concerned, those dispositions which follow Mohammedan law are good only in the sense that had no dispositions been made, the same would result from an application of Mohammedan law, for instance the direction that debts and funeral expenses be paid is in accordance with Mohammedan law and the executors will pay the debts and funeral expenses. On the other hand dispositions which do not follow Mohammedan law are void, for instance by para. 7(b) the testator appears to attempt to tie up most of his estate for a period of five years and in para. 11 he appears to attempt to bind the trustee to disinherit heirs in certain circumstances, and these provisions not being in accordance with Mohammedan law, an application to the court for a declaration that these provisions were void has already been successful.

The cardinal rule is that effect must be given to the intention of the testator; the court of construction must ascertain the language of the will, read the words used and ascertain the intention of the testator from them, see *Freeman, Hope v. Freeman* (3) ([1910] 1 Ch. at p. 691). In the will before the court para. 7(e) opens by stating the rule of Mohammedan law that a testator cannot dispose of more than a third of his estate by will and purports to dispose of that third. Looking at the will as a whole it is seen that in other parts of his will the testator purports to deal with the whole of his estate, including the two-thirds that he cannot dispose of by will and I am satisfied and find that in doing so the testator followed the practice referred to by Doorly, J., above. The result is that if these dispositions are in accordance with Mohammedan law, that is a mere expression of the application of the law and is surplusage, if the dispositions are not in accordance with Mohammedan law they are void. The general rule of the Mohammedan law of succession is that a Mohammedan cannot by will dispose of more than a third of the surplus of his estate after payment of funeral expenses and debts. Bequests in excess of the legal third cannot take effect unless the heirs consent thereto after the death of the testator, see Mulla's Principles of Mohamedan Law (14th Edn.) p. 125. Applying this rule to the will the testator in para. 7 directs that "After my death all my debts shall be paid from my property and thereafter reasonable expenses shall be incurred for my funeral" – this is in accordance with the general rule set out above and is not objectionable. "And other ceremonies", if there are payments for this, whether or not they are chargeable in accordance with Mohammedan law will fall to be decided on taking accounts, "and marriage expenses of my unmarried sons and daughters shall be paid from that", the testator directs that such expenses be paid from the gross estate and whether or not they are so chargeable by reason of a rule of Mohammedan law again will fall to be decided on taking accounts. In para. 4 of his affidavit dated October 15, 1962, the first respondent states that approximately Shs. 50,000/- has been spent for the marriage of Anwarali Nazerali Jiwa, and in effect that this sum comes out of the one-third of the estate that the deceased was entitled by law to give by will. That in my view is not a correct construction of the will, the testator disposed of the one-third willable estate in para. 7(e) and if marriage expenses of unmarried sons and daughters in general, and the Shs. 50,000/- spent on the marriage of Anwarali Nazerali Jiwa in particular, are payable from the estate this must be as a result of the application of a rule of

Mohammedan law, either from the gross estate, as stated by the testator, or from the two-thirds now willable estate. The testator continued "The remaining property shall be disposed of in the following way. (a) If according to Khoja Ithnasheri law duty is payable then it shall be paid". This duty would seem to be payable to the Government of Kenya as a result of the law of Kenya and not to be objectionable. Paragraph 7(b) as already mentioned this, being contrary to Mohammedan law, has been declared void. Paragraph 7(c) this is a disposition relating to the two-thirds non-willable estate, again if this is payable out of the two-thirds unwillable estate by a rule of Mohammedan law it is good, if not it is void. Paragraph 7(d) this having been declared void, fails also. Paragraph 11 again declared Void. Paragraph 12, if by Mohammedan law the property mentioned does belong to the estate of the deceased, it forms part of the two-thirds non-willable estate and if the bequests are in accordance with Mohammedan law they are good, if not, they are void.

Summarising, it is seen from the language of the will that the intention of the testator is:

1. He confirms that he is a Khoja Ithnasheri.
2. He confirms that he is Mohammedan.
3. He states that Mohamedan law applies to his sect, the Khoja Ithnasheri and by Mohammedan law he can dispose of by will one-third only of his estate, and proceeds to do so.
4. Presumably by reason of the fact that there is no express provision of the law, and no judicial decision that the Mohammedan law applies to the administration of estates of the Khoja Ithnasheri, and to provide against the possible consequences of it not having been established that the Khoja Ithnasheris have abandoned their old law (under which they could lawfully dispose of the whole of their estate by will) and dopted Mohammedan law, the testator attempted to set out the disposition by operation of Mohammedan law of his two-thirds non-willable estate.
5. As far as the purported disposition of his two-thirds non-willable estate is concerned
 - (i) Some dispositions appear to be good and the law will take its course.
 - (ii) Some are contrary to Mohammedan law and have already been declared void.
 - (iii) On account those dispositions whose validity are in doubt should be made subject to the direction of the court.

Having ascertained the intention of the testator from a consideration of the language of the will it is possible to make an attempt to ascertain the intention of the testator in the codicil, which is:

"I, the undersigned, Nazerali Jiwa, Khoja Shiah Ithnasheri, aged 60 years, before this I have made one Will which is deposited in National Bank of India, Mombasa and in addition to this Will I make following addition to it:

- (1) I have no private property except the shares of Sheriff Jiwa & Co. Ltd., and Nyanza Oil Mills Co. Ltd.,
- (2) I have six sons and five daughters. All these are by my only wife Koolsum. Except these I have no other wife, children or mistress.
- (3) As a natural love gift I have given five per cent, shares of each of the above-mentioned companies to each of my six sons.
- (4) Son No. 4, Ali Mussa Raza by name, I do not think this son's behaviour is good because he had privately married with an Ismaili woman and

thereafter he divorced her from Karachi through my daughter Mariambai. Money of which notice and dowry were sent through Akram, Advocate of Nairobi by a draft on National Bank of India. Thereafter this son returned from Karachi and because of his much request he was married in Zanzibar to Mehrumbai the daughter of Mohamedali Shivji Haji but it was known later that his affairs with the previously divorced woman Mumtaz still continues. Due to these circumstances, it is my demand of my trustees that if according to the Mussalman Law he could be struck off from inheritance then he should be struck off and in his place his own son Anarali who was born by Mehrumbai shall be given.

- (5) If according to Mussalman law my son No. 4, Ali Musee Raza cannot be struck off then from my property the trustees shall give Anar Ali Shs. 50,000/- in words Shillings fifty thousand for his maintenance and education. It is my recommendation that after giving Anar Ali complete education one of my remaining five sons should give him (Anarali) his daughter in marriage and keep him together in business.
- (6) My servant Karama bin Muhmuh who is Arab by caste shall be given Shs. 5000/- in words shillings five thousand from my property by my trustees.
- (7) Whatever ornaments my wife has were given to her since many years as gift and the ornaments are in safe deposit of National Bank of India of Mombasa in my name. No one else has any right to these ornaments.
- (8) My prayers (namaz) and fasts of 33 years are undone that my wife or sons shall have them completed from my property."

Counsel for the respondent submits that by the words "in addition to this will I make the following additions to it", the testator attempts to make further dispositions "in addition" to the one-third willable property and as this exceeds that one-third the whole codicil is void. I do not agree. Looking at the codicil as a whole I am satisfied and find that by the words "in addition to this Will" the testator intended that the codicil was to be read with the will and by "the following addition to it" the testator intended to add to the provisions of his will. Paragraphs (1) and (2) are mere declarations. Paragraph (3) this disposition relates to the two-thirds non-willable estate and if in accordance with Mohammedan law is good, if not, it is void. Paragraph (4), this was subject to a successful application to the court for a declaration that the provision was void. Paragraph 5, this is the subject of the application. In this paragraph the testator uses the words "from my property". What does the testator mean by this phrase? Does he mean from my gross or net estate or does he mean from my one-third willable estate? Supporting the former there is para. (6) of the will where the testator refers to "my property" clearly in the sense of his gross estate. Supporting the latter there is para. 7(e) of the will where the testator says "my entitlement is one-third that amount is mine", that is as he says "it is my property to dispose of as I wish by will". The testator's intention as expressed in the language of the codicil appears to follow that of the will, he says "if by Musalman law he could be struck off from inheritance then he should be struck off", that is he recognises that he cannot dispose of certain of his property by will but if by a rule of Mohammedan law his son Ali Mussa Raza can be disinherited that is to be so. The testator continues that if Ali Mussa Raza cannot in effect be deprived of his portion of the two-thirds unwillable estate "then from my property" the trustees, etc. "My property" in my view means the one-third willable part of the estate. That is "If my son Ali Mussa Raza can by a rule of Mohammedan law be deprived of his portion of the non-willable portion of the estate let that be done and his son Anerali is to take his portion, but if by the rules of Mohammedan law this

cannot be attained and Ali Mussa Raza is to receive his portion of the two-thirds non-willable estate then Anerali is to have Shs. 50,000/- from my one-third willable estate. This I find to be the intention of the testator ascertained from consideration of the language of the will and the codicil. This being so there must be an order in the terms of (1) of the Summons.

Order accordingly. Costs to be borne by the estate, on solicitor and client basis.

For the plaintiff:

K. M. Pandya, Mombasa

K. M. Pandya with L. J. Manghnani

For the defendants:

Inamdar & Inamdar, Mombasa

I. T. Inamdar

Wellington Thuku Paul Mugo and others v Republic [1966] 1 EA 124 (HCK)

Division: High Court of Kenya at Nairobi

Date of judgment: 30 October 1965

Case Number: 779, 670 and 647/1965

Before: Rudd Ag CJ and Dalton J

Sourced by: LawAfrica

[1] *Criminal law – Evidence – Identification bearing on identity of co-accused.*

[2] *Criminal law – Evidence – Admissibility – Character not in issue – Whether evidence of another offence admissible when a fact in issue – Evidence Act, 1963, s. 57(1)(a)(K.).*

[3] *Statute – Construction – Marginal note used to restrict meaning of section.*

Editor's Summary

The appellants were each convicted on five counts of robbery with violence committed in quick succession at five petrol stations in and around Nairobi. A stolen Ford car was used on each occasion. Their identities were established at identification parades by witnesses who also misidentified innocent men. It was argued for the appellants that these discrepancies made all the identifications unreliable. It was also submitted on the basis of s. 57(1)(a) of the Evidence Act, 1963, that the lower court should have directed itself that any evidence which showed that an accused was guilty of an offence on any of the other counts was inadmissible and could not be taken into account when considering the count in question. The prosecution asked for the sentences to be enhanced.

Held –

- (i) the identifying witnesses could be relied on only in so far as they identified a particular appellant with a particular count;
- (ii) s. 57(1)(a) of the Evidence Act, 1963, properly construed in conjunction with the marginal note, was intended to prevent evidence of previous offences or charges, the accused's character not being in issue, where the only effect would be to demonstrate a tendency or propensity to commit the offence in question; consequently the section could not be used to exclude evidence of the commission of another offence when such evidence was admissible as evidence of a fact in issue.

Appeals allowed in part; convictions upheld on certain counts on which sentences enhanced.

Cases referred to in judgment:

- (1) *Nicholson v. Fields* (1862), 31 L.J. Ex. 233.
- (2) *Sheffield Water Works Co. v. Bennet* (1872), L.R. 7 Ex. 409.
- (3) *Bushell v. Hammond*, [1902] 2 K.B. 533.

Judgment

Rudd Ag CJ, read the following judgment of the court: These appeals were consolidated. The three appellants each appeal from convictions on five counts of robbery with violence and from concurrent sentences of four years imprisonment on each count coupled in respect of the first count with twelve strokes of corporal punishment.

On the night of April 24, robberies with violence were committed at five petrol stations in or about Nairobi by a gang or part of a gang or gangs of robbers who used a stolen Ford Zephyr motorcar as a means of transport to and from each of the petrol stations, the same car being used by the gang concerned in each incident.

The first robbery took place at High Ridge petrol station at about 8.30 p.m. and was perpetrated by seven men, none of whom have been identified.

The second robbery took place at the Kenol Langata petrol station and was perpetrated by six men at about 9 p.m. PW. 8 identified the first appellant at a properly held identification parade as being one of the robbers.

The third robbery took place at about 10 p.m. at Agip Petrol station in Ngong Road. It was perpetrated by seven men and PW. 4. identified all three appellants as members of the gang that committed the robbery. It was sought to discredit these identifications on the ground that this witness identified another additional man who was not a suspect at an identification parade as being a member of the gang. The fact that a witness identifies an innocent person at an identification parade does not necessarily mean that his identification of other men was not true and correct and in the case of the second appellant it is to be noted that PW. 4 knew him before. This might be a reason for not holding an identification parade for this witness in relation to the second appellant according to the circumstances, but it does nothing to throw doubt upon the correctness of the identification of the second appellant. In fact it points to the identification being correct since it was found that the witness was an honest witness and as he knew this appellant before he is not likely to have made a mistake as to his identity.

The fact that this witness picked out an innocent man at an identification parade is as against the other appellants a point in favour of the defence to some extent, but it does not go very far since a witness may be certain of his identification of some members of a gang and less certain in his identification of another member of the gang. These identifications of the appellants by the fourth witness are supported by the fact that each of the appellants was identified by at least one other witness as being concerned in other robberies committed on the same evening and using the car which was used in all the robberies. It is the common link with the car which is of salient importance in this connection.

The fourth robbery occurred at about 10.15 p.m. at the Sonning Road petrol station and was committed by a gang of eight men. The third appellant was identified by the seventh witness as being one of these robbers and we see no reason to doubt the correctness of that identification. He was also identified as one of the robbers by PW. 22 but this witness also pointed out a man who was not a suspect at an identification parade.

The fifth robbery occurred at the Sclaters Road petrol station at about 10.30 p.m. and was committed by a gang of five men. PW. 17 identified the third appellant as one of these robbers. This witness too had picked out a person who was not a suspect at an identification parade, but in the case of his identification

of the third appellant it is to be noted that he knew this appellant before and this appellant was arrested on information given by this witness. All these prosecution

witnesses were held to be honest witnesses. The main question was as to the identification of the appellants as being among the members of the gang of the robbers. No one was identified in relation to the first count.

The first appellant was identified by PW. 8 in relation to the second count and by PW. 4 in relation to the third count. He was not identified in relation to the other counts.

The second appellant was identified in relation to the third count by PW. 4 who knew him before and in relation to the fourth count by PW. 22; he was not identified in relation to the other counts.

The third appellant was identified in relation to the third count by PW. 4. In relation to the fourth count by PW. 7 and PW. 22 and in relation to the fifth count by PW. 17 who knew him before. The identification of the first appellant by PW. 8 appears to be satisfactory. His identification by PW. 4 was perhaps less satisfactory, but it is corroborated by PW. 8's identification in as much as this identification shows that he was in the gang with the car about half an hour before the third incident.

The identification of the second appellant by PW. 4 appears to be satisfactory since the witness knew him before.

The identification by PW. 22 is perhaps less reliable, but it receives support from the identification by PW. 4 which shows that he was with the gang in the car about a quarter of an hour before the fourth incident.

The identification of the third appellant by PW. 7 and by PW. 17 appears to be satisfactory. His identification by PW. 4 and PW. 22 is perhaps less reliable but gains support from the identifications by PW. 7 and PW. 17.

We have considered arguments advanced to us on the basis of alleged discrepancies but we do not consider that any discrepancies in the evidence are such as to throw doubt upon the basic truthfulness and honesty of the identifying witnesses called by the prosecution. We are satisfied that the lower court was well entitled to accept the identifications of the first appellant by PW. 8 and PW. 4 of the second appellant by PW. 4 and PW. 22, and of the third appellant by PW.s 4, 7, 17 and 22.

The defence of the first appellant was an alibi set out at an early stage in his statement to the police. Though defended by an advocate the first appellant did not venture to submit himself to cross-examination on this alibi. At first he declined even to make an unsworn statement though later he asked to be allowed to make such a statement but only after the evidence of the defence witnesses was taken. Such a course in relation to such a defence is happily unusual and is not one which is likely to instil great confidence in the truth of the defence. Some of the witnesses for the defence did in fact give evidence which if believed would have established this alibi, but one of the defence witnesses categorically denied the truth of the evidence which he appears to have been expected to give in support of the alibi. The second and third appellants attempted to set up less detailed alibis. They too adopted the unusual course of first electing to say nothing and then after the defence evidence was taken they asked and were allowed to make unsworn statements. The lower court considered these defences and rejected them. We do not consider that it erred in doing so.

On the basis of the evidence admitted construed with reference to the rules of evidence as ordinarily understood and heretofore generally accepted there was ample material to justify the conviction of the first appellant on the second and third counts, the conviction of the second appellant on the third and fourth counts and the conviction of the third appellant on the third, fourth and fifth counts. The lower

court however convicted all the appellants on all five counts. It may well be that the appellants were in fact guilty on all counts, either on the

basis of principals or of aiders and abettors or as counselling and procuring, but in view of the evidence that the number of robbers using the motor-car in connection with the robberies varied in respect of each incident, we think that it would have been safer to have acquitted the three appellants on the first count. The second and third appellants on the second count, the first appellant on the fourth count and the first and second appellants on the fifth count.

A novel argument was advanced however on the basis of s. 57(1) of the Evidence Act, 1963. This subsection reads as follows:

“In criminal proceedings the fact that the accused person has committed or been convicted of or charged with any offence other than that with which he is then charged, or is of bad character, is inadmissible unless:

- (a) the proof that he has committed or been convicted of such other offence is admissible under s. 14 or s. 15 of this Ordinance to show that he is guilty of the offence with which he is then charged; or
- (b) he has personally or by his advocate asked questions of a witness for the prosecution with a view to establishing his own character, or has given evidence of his own good character; or
- (c) the nature or conduct of the defence is such as to involve imputations on the character of the complainant or of a witness for the prosecution; or
- (d) he has given evidence against any other person charged with the same offence:

Provided that the court may in its discretion, direct that specific evidence on the ground of the exception referred to in para. (c) of this subsection shall not be led if, in the opinion of the court, the prejudicial effect of such evidence upon the person accused will so outweigh the damage done by imputations on the character of the complainant or of any witness for the prosecution as to prevent a fair trial.”

On the basis of this subsection it was argued that in considering any one of the five counts the lower court should have directed itself that any evidence which showed that an appellant was guilty of an offence on any of the other counts was inadmissible and could not be taken into account when considering the count in question.

With all due respect para. (a) of this subsection is very badly phrased and should be amended as quickly as possible because as at present framed it departs from the well accepted rules of evidence. It never was the law that evidence of the commission of similar offences could only be admitted in the circumstances and for the purposes set out in ss. 14 and 15 of the Act where the defence has not put the accused's character in issue, yet that is what the subsection seems to say. If this subsection were to be given a full interpretation in that sense the result would be farcical.

Suppose a police officer came across a person whom he knew had escaped from lawful custody while serving a lawful sentence of imprisonment and suppose that the police officer was murdered by that person while attempting lawfully to arrest him for escape, then in those circumstances it could never have been the intention of the legislature to enact that the escape, which is an offence, could not be proved in order to establish that the attempted arrest was lawful. Nor would it have been the intention of the legislature to enact that evidence of the escape could only be admissible on the trial for murder if the charge or information contained a count for escape as well as a count for murder.

Again in the case of a prosecution for corruption of a man who, on being arrested for another offence which he had previously committed, offered a

bribe to the person effecting his arrest in order to obtain his release corruptly, it could never have been the intention that evidence could not be adduced to prove the fact of the original offence which is relevant as showing motive for the corruption under s. 8. One could multiply instances of cases where it would be quite farcical to give s. 57 its full meaning according to the words used. The section cannot have been intended to prohibit evidence of the commission of an offence other than that charged in all cases except those where the evidence is admissible under s. 14 or s. 15 of the Act. It cannot have been intended to prohibit such evidence where it is directly relevant to the facts in issue.

We have no doubt but that the object of s. 57(1)(a) was to prohibit evidence of previous offences where its effect would be merely tendentious. It was intended to prohibit evidence of previous offences or charges where the only effect of such evidence would be to show merely that the accused had a tendency or propensity to commit offences similar to that with which he has been charged and to prohibit evidence merely of bad character where the accused's character has not been put in issue in one of the accepted ways in which that can be done.

The clue to the real intention of the legislature is to be found in the marginal note to s. 57 which reads "Bad character in Criminal Cases". Ordinarily a marginal note will not be taken into consideration in derogation of the words of a section. This stems from the old English practice whereby bills were engrossed without punctuation on parchment, and as neither the marginal notes nor the punctuation appeared on the roll they formed no part of the Act. This practice was discontinued in 1849 since which time a copy of each Act of Parliament of the United Kingdom printed on vellum is preserved in the House of Lords. Both marginal notes and punctuation now appear on the rolls of Parliament in the United Kingdom and on the official records of the Acts of the Parliament of Kenya. Nevertheless, the old tradition continues and it has been said that marginal notes and punctuation are not to be taken as part of the statute. Ordinarily it should not be necessary to have to refer to the marginal notes to ascertain the meaning of a section of an Act. Ordinarily, therefore, marginal notes are not to be considered when construing the sections of an Act.

Yet there are cases where a marginal note can show what the section was intended to cover. Thus in *Nicholson v. Fields* (1) ((1862) 31 L.J. Ex. at p. 237), Martin, B., referred to the marginal note to help in ascertaining the proper construction of a section of an Act. In *Sheffield Water Works Co. v. Bennet* (2) ((1872) L.R. 7 Ex. at p. 421) Cleasby, B., said that one may use the marginal note in considering the general sense in which words are used in an Act. In that case to avoid absurdity "rent" was construed as meaning annual value. In *Bushell v. Hammond* (3) ([1902] 2 K.B. at p. 567) Collins, M.R., indicated that in construing a subsection "some help will be derived from the side note (though of course it is not part of the statute) which shows that the section is dealing with (certain matters)."

The marginal note to s. 57 of the Evidence Act shows, in our opinion, that the section was intended to deal with the admissibility and inadmissibility of evidence of bad character in criminal cases. When, therefore, s. 57(1) made evidence of previous convictions and the like inadmissible it was doing so only when the evidence would merely go to bad character, criminal propensity and the like and it seems to us that it could not have been the intention to prevent the admission of evidence of the commission of another offence when such evidence was admissible as evidence of a fact in issue or directly relevant to a fact in issue.

We have dealt with this matter at some length because of its great importance in a great number of cases if fair justice is to be done and not unreasonably fettered by the unsuitable wording of s. 57.

However as regards the instant appeals the section is no bar because there was

no evidence of the commission of offences other than those with which the appellants were charged. On any reasonable construction of the section such evidence was admissible.

On any reasonable view of the requirements of justice, when it is proved that a motor-car was used in connection with a robbery committed by the users of the car and the question was whether the accused or any of them were among the users of the car at the time of the robbery, it is open to the prosecution to prove that the accused or some of them were using the car on the day of the robbery some short time before or after the robbery in question. If this involved evidence that the accused or some of them were involved in another robbery there is nothing in reason to prevent such evidence being given and it would be unreasonable and contrary to justice that such evidence should be rendered inadmissible. It is not to be believed that the legislature should have intended to make such evidence absolutely inadmissible.

Finally as regards the instant appeals we do not support the convictions where there was no evidence of identifying a particular appellant with a particular count. We are only upholding the convictions of an appellant where he has been identified as participating in a particular robbery.

The magistrate in convicting on those counts which are now upheld by us did so because he was satisfied that these identifications were reliable. He was prepared to convict on the other counts because he was satisfied with the identifications in those counts in which we upheld the convictions. In this we think he was in error in view of the fact that it was clear that all the same persons did not commit all the robberies.

But the basic finding of the magistrates was that the identifications were reliable in relation to the counts to which they referred. If he went too far in extending the effect of those identifications as affecting the appellants in relation to the other offences charged, that cannot nullify the correctness of the reasons for the convictions on the counts in which there was reliable identification.

We uphold the conviction of the first appellant on the second and third counts.

We uphold the conviction of the second appellant on the third and fourth counts. We uphold the conviction of the third appellant on the third, fourth and fifth counts. We allow the appeals from conviction of the first appellant on the first, fourth and fifth counts, of the second appellant on the first, second and fifth counts and of the third appellant on the first and second counts. The sentences on these counts must also be set aside.

As regards sentence the State asked for enhancement of the sentences as originally imposed. As a result of our decision the sentences of corporal punishment fall away with the sentences on the first count.

We have considered the argument for enhancement and afforded counsel an opportunity to meet it.

Although the third appellant had no previous convictions, and the first and second appellants were treated as first offenders, each was concerned in at least two robberies and the offences were all gang robberies. The gangs were in some way associated since they all used the same car and violence was used in each robbery. Clearly it is a case for corporal punishment. In view of these features we consider that really heavy sentences are called for.

We alter the sentences as follows:

First appellant on count 2 – 6 years' imprisonment and 12 strokes. On count 3 – 6 years' concurrent imprisonment.

Second appellant on count 3 – 6 years' imprisonment and 12 strokes. On count 4 – 6 years' concurrent imprisonment.

Third appellant on count 3 – 6 years’ imprisonment and 12 strokes. On count 4 – 6 years’ concurrent imprisonment. On count 5 – 6 years’ concurrent imprisonment.

Appeals allowed in part: convictions upheld on certain counts on which sentences enhanced.

For the first appellant:

A. R. Kapila & Co., Nairobi

A. R. Kapila

For the second appellant:

Omondi & Gautama, Nairobi

R. Shah

For the respondent:

The Attorney-General, Kenya

J. R. Hobbs

S C Baxi v The Bank of India Limited
[1966] 1 EA 130 (CAK)

Division:	Court of Appeal at Kampala
Date of judgment:	17 January 1966
Case Number:	43/1965
Before:	Sir Clement de Lestang Spry and Law JJA
Sourced by:	LawAfrica
Appeal from:	The High Court of Uganda – Russell, J.

[1] Practice – Application for dismissal of suit – Action brought vexatiously against Bank in Uganda – Accessible court where cause of action arose – Civil Procedure Rules, O. 6, r. 29 (U).

Editor’s Summary

The appellant maintained a bank account with the defendant’s branch in Bombay and in 1962 when he was in Bombay issued a cheque for Rs. 5,000/- on his current account which admittedly had funds. The cheque was dishonoured in the mistaken belief that the appellant’s account was a “Foreign Non-Resident’s Account” and it was returned requiring approval from the Reserve Bank of India. Because the cheque was dishonoured the appellant failed to complete the purchase of a house. Subsequently, on his return to Uganda the appellant filed a suit against the Bank of India and served the plaint on its Kampala Branch claiming damages for “loss and expenses” incurred “by reason of the

defendant's or his agent's failure to pay the said cheque", and for "loss of comfort and convenience" and "loss of prestige". The respondent applied by notice of motion under O. 6, r. 29 and under the court's inherent power for the suit to be dismissed as being vexatious and an abuse of the process of the court. The application was supported by an affidavit from the respondent's Kampala branch manager. The trial judge found that the inconvenience which would result in trying the suit in Uganda would be vexatious, and relying on the matters raised in the manager's affidavit, and not on the pleadings, dismissed the suit pursuant to O. 6, r. 29. The appellant thereupon appealed on the grounds (a) that the affidavit was inadmissible and (b) that the trial judge had failed to consider that the appellant was resident in Uganda and could only proceed to India for the purpose of litigation at considerable inconvenience and expense.

Held –

- (i) the application had been made under the court's inherent jurisdiction in exercise of which the trial judge had in fact dismissed the suit to prevent abuse of the process of the court and that being so, he was entitled to look at the affidavit;
- (ii) had the application been made only under O. 6, r. 29, it would have been necessary for the respondent to show by the pleadings alone that the suit was

frivolous or vexatious and the affidavit would have been inadmissible for this purpose;

- (iii) to have allowed the suit to proceed in Uganda would have worked serious injustice upon the respondent out of all proportion to the inconvenience which the appellant would have suffered if he had brought his action in Bombay.

Appeal dismissed.

Cases referred to in judgment:

- (1) *Attorney-General of the Duchy of Lancaster v. London & North Western Railway Co.* (1892), 3 Ch. 274.
- (2) *Logan v. Bank of Scotland (No. 2)*. [1906] 1 K.B. 141.

The following judgments were read:

Judgment

Law JA: This is an appeal by the plaintiff in Civil Case No. 612 of 1964 in the High Court of Uganda against an order of Russell, J., dismissing the suit on the ground that it is vexatious. The facts are not in dispute. The appellant is an advocate who is ordinarily resident in Uganda. He has a bank account with the Bank of India in Bombay. In 1962 the appellant was in Bombay. He negotiated with a Mrs. Premji for the purchase of a house in Bombay, and gave her as deposit a cheque for rupees 5,000 drawn on his current account which was admittedly in funds. Under the mistaken belief that the appellant's account was a "Foreign Non-Resident's Account" the bank in Bombay did not honour the cheque when it was presented by Mrs. Premji but returned it to the plaintiff marked "F.N.R. A/C. Reserve Bank's approval required on Form A7". Apparently Mrs. Premji then withdrew from the negotiations for the sale of her house. This was in November, 1962. Some time later the appellant returned to Uganda, and on September 15, 1964, filed a suit against the Bank of India, and served the plaint on its Kampala branch claiming damages for "loss and expenses" incurred "by reason of the defendant's or his agent's failure to pay the said cheque". In addition the plaint contains claims for damages for "loss of comfort and convenience" and "loss of prestige".

By a notice of motion dated October 26, 1964, the defendant bank (hereinafter called the respondent) applied to the High Court for an order that the suit be dismissed as being vexatious and an abuse of the process of the court. The application was said to be made under O. 6, r. 29 of the Civil Procedure Rules of Uganda, and under the court's inherent power, and was supported by an affidavit made by Mr. Shukla, the manager of the Bank of India's Kampala branch.

Order 6, r. 29 so far as it is relevant reads as follows:

"The court . . . , upon application. . . in the case of the suit or defence being shown by the pleadings to be frivolous or vexatious, may order the suit to be stayed or dismissed . . . as may be just."

By s. 101 of the Civil Procedure Ordinance (Cap. 6), nothing in the Ordinance shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

The learned judge found that the inconvenience which would result in trying the suit in Uganda would

be such as to work a serious injustice on the respondent and to be vexatious, and it is clear from a perusal of his order that the reasons which led him to this conclusion were the matters raised in Mr. Shukla's affidavit, and not anything appearing from the pleadings. Accordingly, although the

judge said, in his order, that he dismissed the suit “pursuant to O. 6, r. 29” it is clear that he in fact dismissed the suit in the exercise of the court’s inherent power to prevent abuse of the process of the court. This being so, the judge was entitled in my view to look at Mr. Shukla’s affidavit. Had the application to dismiss the suit been made only under O. 6, r. 29, it would have been necessary for the respondent to show by the pleadings alone that the suit was frivolous or vexatious, and Mr. Shukla’s affidavit would have been inadmissible for this purpose as the only way of dealing with such an application is by looking at the pleadings (*Attorney-General of the Duchy of Lancaster v. London and North Western Railway Company* (1)). In this case, however, the application was also made under the court’s inherent jurisdiction, on grounds other than those appearing from the pleadings, and in such a case it is perfectly proper for the court to look at the affidavits of the parties filed in support of and in opposition to the application (*Logan v. Bank of Scotland* (2)). The first ground of appeal, that the judge erred in admitting and relying on Mr. Shukla’s affidavit, must accordingly in my opinion fail. Of the other grounds of appeal argued by counsel for the appellant, the most important in my view were Nos. 6 and 7.

Ground 6 reads:

“The learned trial judge has misdirected himself in not paying any or sufficient weight to the admission of the respondent that there was negligence and as such a breach of duty on their part towards the appellant. As such on mere admission also the appellant is, at the very least, entitled to nominal damages.”

If this was merely a case of assessing damages for failure to honour a cheque, very strong reasons would have to be shown for depriving the appellant of the right to choose his forum. However, counsel for the respondent has assured us that his clients have at no time admitted liability either in contract or in tort, and this is borne out by the correspondence exhibited with the affidavits. The respondent has admitted that, in returning the cheque to the appellant, it committed a bona fide error, but it has never admitted that this error gave rise to a cause of action or that the appellant is entitled to damages, whether nominal or otherwise. This ground of appeal is therefore, in my opinion, based on a misapprehension on the part of the appellant that liability has been admitted.

Ground 7 reads as follows:

“The learned trial judge has totally failed to give any regard to and or has paid scant regard to the appellant’s own convenience. He is a resident of Uganda where he carries on his profession and could only proceed to India for the purpose of litigation at the cost of considerable inconvenience and expenses.”

To my mind this is the most substantial ground of appeal, and the one which has caused me most concern. Counsel for the appellant has submitted that if the appellant is forced to bring his action in Bombay, he will be put to great expense and inconvenience. The learned judge had the question of convenience very much in mind, and referred in this connection to the judgment of Sir Gorell Barnes, P., in *Logan v. Bank of Scotland* (2). The following is an extract from that judgment:

“Yet it seems to me clear that the inconvenience of trying a case in a particular tribunal may be such as practically to work a serious injustice upon a defendant and be vexatious. This would probably not be so if the difference of trying in one country rather than in another were merely measured by some extra expense; but where the difficulty for the defendant of trying in the country in which the action is brought is such that it is

impracticable to properly try the case by reason of the difficulty of procuring the attendance of busy men as witnesses and keeping them during a long trial, and having to deal with masses of books, documents, and papers which are not in the country where the action is brought, and of dealing with law foreign to the tribunal, it appears to me that a case of vexation in some circumstances may be made out if the plaintiff chooses to sue in that country rather than in that where everybody is and where all the witnesses and material for the trial are.”

Applying those observations to the facts of this case, what is the position? The appellant is physically in Uganda. The only ground conferring jurisdiction on the courts in Uganda is that the Bank of India happens to have a registered place of business in Uganda. The alleged cause of action arose in Bombay; the appellant’s witnesses which he will require to prove his special damages all live in Bombay; the law to be applied is the law of India, which would have to be proved by experts if the suit were tried in Uganda. This is precisely the situation which Sir Gorell Barnes had in mind when he commented, later in in his judgment, as follows:

“Suppose, again, for instance, that this action had been brought against all the present defendants except Scott, and the bank had been served in this country, which it can be, as it has been in the present case, because it had a branch here, could there be any reasonable doubt but that the plaintiff must be treated as intending to bring a vexatious action and that such action would be stayed? If that were not held, I see no reason why anyone abroad might not sue and be allowed to proceed, against a bank which had a branch in this country, in respect of transactions all of which had taken place in some other country where the head office of the bank was – e.g. Australia or Brazil – and where the inconvenience of trying the case in this country would be so enormous as practically to work the most serious injustice upon the defendant.”

The only difference between the hypothetical case considered in the above extract and the present case is the fact that the appellant is resident in Uganda. The branch of the respondent Bank of India in Uganda, which has been served, has no knowledge of the facts giving rise to the alleged cause of action, which arose in India, where all the witnesses reside except for the appellant, and where all books and documents relative to the suit are situated. After careful consideration I find myself in full agreement with the learned judge that to allow the suit to proceed in Uganda would work serious injustice upon the respondent, out of all proportion to the inconvenience which the appellant will suffer if he has to bring his action in Bombay. I see no reason to differ from the finding that the proposed suit is vexatious and an abuse of the process of the court.

I would dismiss this appeal, with costs.

Sir Clement De Lestang: I have had the advantage of reading in advance the judgment prepared by Law, J. A., with which I agree. The order will be in the terms proposed by him.

Spry JA: I also agree.

Appeal dismissed.

For the appellant:

J. S. Shah, Kampala

For the respondent:

Pareklji & Co., Kampala

P. J. Wilkinson, Q.C. and Y. V. Phadke

Jesse Kimani v McConnell and another
[1966] 1 EA 134 (HCK)

Division: High Court of Kenya at Nairobi
Date of judgment: 10 February 1966
Case Number: 504/1965
Before: Harris J
Sourced by: LawAfrica

[1] Practice – Judgment ex parte – Meaning of ex parte – Considerations affecting court’s discretion to set it aside – Civil Procedure (Revised) Rules, 1948, O. 9, r. 10 and r. 24 (K).

Editor’s Summary

The defendants applied to have an ex parte judgment set aside in the following circumstances; they had negotiated with the plaintiff for the sale of their farm and equipment near Nairobi to the extent that the plaintiff entered into possession on terms after executing an engrossed version of an agreement for sale tendered by the defendants’ advocates. The defendants refused to execute the agreement alleging that its terms went beyond their instructions to their advocates. The plaintiff sued for specific performance of the agreement and in default of a defence listed the case for formal proof ex parte. A notice of motion on behalf of the defendants to extend the time for filing a defence and to say the ex parte hearing was listed, heard and dismissed immediately before the ex parte hearing. Thereupon the ex parte hearing took place in the defendants’ absence and judgment was entered for the plaintiff. At the defendants’ application to set this judgment aside under O. 9, r. 10 and r. 24 the plaintiff contended firstly, as a preliminary objection which failed, that the judgment obtained was inter partes since the defendants were sent a hearing notice and both participated and were defeated in proceedings for a stay of the ex parte hearing and secondly, if the judgment was ex parte, that the defendants were not prevented from filing a defence in time, that they had no good defence and that the judgment obtained had vested a right in the plaintiff. The defendants argued in person that the judgment was capable of being set aside, that there were triable issues favourable to themselves, that they had made a bona fide application for leave to file defences out of time and to stay the ex parte hearing, that they were not personally at fault and that no irreparable damage would result to the plaintiff if their applications were allowed.

Held –

- (i) assuming, without deciding, that O. 9, r. 10, was restricted to ex parte judgments, the judgment obtained by the plaintiff was ex parte because the notice of motion of the defendants for a stay, followed by their withdrawal, did not constitute an appearance;

Satish Chandra Mukerjee v. Ahara Prasad Mukerjee (1907), 34 Cal. 403, followed.

- (ii) after considering the purpose of O. 9, r. 10 and r. 24, and enquiring whether any different material factor entered into the passing of the ex parte judgment, and so finding, and after reviewing the

surrounding circumstances and the merits of each case the court's discretion would be exercised in favour of the defendants on terms.

Application allowed, ex parte judgment set aside on condition that defences filed within 28 days.

Cases referred to in judgment:

- (1) *Wise v. Kishenkoomar and Another*, 4 Moore's Indian Appeals 201.
- (2) *National and Grindlays Bank Ltd. v. Kentiles Ltd.*, ante, p. 17.
- (3) *Satish Chandra Mukerjee v. Ahara Prasad Mukerjee* (1907), 34 Cal. 403.

- (4) *Din Mohamed v. Lalji Visram & Co.* (1937), 4 E.A.C.A. 1.
- (5) *H. Clark (Doncaster) Ltd. v. Wilkinson*, [1965] 1 Ch. 694; 1 All E.R. 934.
- (6) *Branca v. Cobarro*, [1947] K.B. 845; 2 All E.R. 101.
- (7) *Rossiter v. Miller* (1878), 3 App. Cas. 1124.
- (8) *Gatti v. Shoosmith*, [1939] 1 Ch. 841; 3 All E.R. 916.
- (9) *Wood v. Manchester Corporation* (unreported).

Judgment

Harris J: This is an application by the defendants to set aside a judgment in default of defence passed by this court on September 20, 1965, and the decree consequent thereon, whereby the plaintiff was granted an order for specific performance of a contract for sale of certain immovable property and chattels into which the defendants were said to have entered earlier in the year. The application, as amended by consent, is brought under the provisions of rr. 10 and 24 of O. IX of the Civil Procedure (Revised) Rules, 1948, and under the inherent jurisdiction of the court.

Before dealing with the substantial issues raised by the application it is necessary first to consider an objection in limine taken by the plaintiff to the effect that the matter does not properly fall within the terms of either r. 10 or r. 24 for the reason that, as is submitted, the judgment in question was not in fact an ex parte judgment and that therefore this court has no jurisdiction to entertain the application. The circumstances leading up to the judgment may be stated shortly. The plaint was filed on May 28, 1965, and, as the defendants were not at that time within the jurisdiction, substituted service of the summons was, with leave, effected on them, and an appearance was entered by both defendants on July 21, through Messrs. Archer & Wilcock, a firm of advocates acting for them at that time.

The defendants returned to Kenya during the last week of July and the time within which they were required by law to file their defences expired during the first week of August. No defence having been filed the plaintiff's advocate, by a letter dated August 10, requested the High Court Registry to have the case set down for formal proof. The case was accordingly set down to be heard on September 21 and the Registry, on August 18, notified Messrs. Archer & Wilcock of this fact. On September 17, the defendants, through Mr. Swaraj Singh, whom they had in the meantime appointed as their advocate, filed a notice of motion for September 21, seeking an enlargement of time for filing their defences and a stay of adjournment of the hearing already fixed for that date. By an arrangement arrived at between counsel to suit the convenience of counsel for the plaintiff the date of hearing both of the action and of the motion was subsequently advanced to September 20.

The Cause List for September 20, an official copy of which was put in evidence by the plaintiff on the hearing of the application before me, showed that the matters listed on that day before Chanan Singh, J., in Court No. 6 at 10.30 a.m., included, first, the defendants' motion and, immediately afterwards, the formal proof of the plaintiff's claim in the action. At the hearing of the motion the defendants were represented by Mr. Mackie-Robertson, Q.C., and Mr. Swaraj Singh (each of whom had been retained less than one week previously), and the plaintiff by Mr. Gautama. It would appear from the terms of the order made that the latter submitted that the defendants' motion ought to be dismissed and suggested that if the plaintiff should subsequently succeed in obtaining an ex parte judgment the defendants could apply to

have it set aside. The learned judge at the conclusion of the argument dismissed the motion saying that in the circumstances of the case he did not think he should deprive the plaintiff of his right to proceed to formal proof in default of defence and he accepted the

plaintiff's contention that if the defendants were not satisfied with such judgment (if any) as the plaintiff might obtain ex parte they could apply to have it set aside. The defendants were given leave to appeal against the dismissal of the motion and their counsel then withdrew. Subsequently, in the afternoon of the same day, the hearing of the formal proof was duly called and came on before the same judge, Mr. Gautama again appearing for the plaintiff and the defendants neither appearing nor being represented. The case for the plaintiff was formally proved to the satisfaction of the learned judge and judgment pronounced, and it is for the purpose of having his judgment set that the present application is brought.

On these facts counsel for the plaintiff (Mr. Gautama) now contends that since the hearing at which the plaintiff's claim was formally proved was on notice to the defendants, by reason both of the hearing notice sent to their former advocates on August 18 and of the publication of notice in the Cause List, and since they had appeared by counsel and unsuccessfully moved the court for the express purpose of obtaining an adjournment, the hearing of the formal proof was not ex parte and accordingly the judgment then obtained cannot be set aside or varied by this court. In support of his argument he submitted that the learned judge became "seized of the formal proof" as from the commencement, on the morning of September 20, of the hearing of the defendants' motion asking for a stay or adjournment and he submitted that a test of a judgment being ex parte is whether the party against whom it is made participated in the proceedings at which it was pronounced and suggested that once a case is fixed for hearing and such party appears at or before the hearing and applies for an adjournment the hearing becomes inter partes and cannot be ex parte.

What may possibly be the simplest answer to this contention is to be found in the language of the rules themselves. Although the marginal note to O. IX, r. 10, refers to setting aside, ex parte judgments, that rule (unlike r. 24 of the same Order) is not in terms limited to the setting aside or varying of ex parte judgments as such and would appear to extend to all judgments passed pursuant to any of the preceding rules of the Order including even r. 9(1). Not having heard a full argument on this possibility, however, I propose to decide the matter on the basis that the application of r. 10 should be restricted, as the marginal note suggests, to ex parte judgments, and the question therefore is: was the judgment which was passed in this case on the afternoon of September 20 in the absence of the defendants and of their counsel but on notice to them an ex parte judgment?

In Jowitt's Dictionary of English Law, Vol. 1, at p. 744, it is stated that "in its more usual sense, ex parte means that an application is made by one party to a proceeding in the absence of the other. Thus an ex parte injunction is one granted without the opposite party having had notice of the application. It would not be called ex parte if he had proper notice of it and chose not to appear to oppose it". Whatever truth is to be found in the latter part of that statement in relation to the granting of injunctions I am of the opinion that, generally speaking, an order which, in proceedings that are themselves inter partes, is made on the application and in the presence of one party but in the absence of the other may be correctly termed ex parte notwithstanding that the other party had notice of the application and chose not to appear. In *Wise v. Kishenkoomar and Another* (1), the Privy Council, in a case where the respondents to an appeal had not entered an appearance, directed that the appellant should be at liberty to serve due notice upon the respondents and that in the event of their not appearing the Board would "proceed to hear the case ex parte". A similar usage of the term was adopted by the Privy Council in the very recent appeal from the Court of Appeal for Eastern Africa in *National and Grindlays Bank Limited v. Kentiles Limited (in liquidation) and the Official Receiver (as liquidator thereof)* (2) when, in its judgment dated November 25, 1965, referring to the

fact that the respondents did not appear, it said that “although the company and its liquidator were duly made respondents, they have not appeared on the appeal which has been argued ex parte on behalf of the Bank”. Furthermore this is the meaning which appears plainly to be contemplated by O. IX, r. 17(1)(a) of the Civil Procedure Rules.

Counsel for the plaintiff’s submission that merely by the defendants moving the court on the morning of September 20 for an adjournment the court had then become “seized of the formal proof” so that the hearing in the afternoon could not have been ex parte can also be answered by a perusal of the decision in *Satish Chandra Mukerjee v. Ahara Prasad Mukerjee* (3), where the Full Bench of five judges of the High Court of Calcutta unanimously held that an application at the hearing, under whom the case is called, by a pleader on behalf of a party for the purpose of obtaining an adjournment of the hearing, upon the refusal of which the applicant withdrew, does not constitute an appearance by the party at the hearing, Harrington, J., saying:

“I do not see how a pleader can be said to attend at the hearing, merely because, before the hearing begins, he comes and asks the court that there may be no hearing. The hearing does not begin till his application is disposed of.”

That case was distinguished, but without any suggestion of disapproval by the former Court of Appeal for Eastern Africa in *Din Mohamed v. Lalji Visram & Co.* (4) upon which counsel for the plaintiff relied but in which the facts were materially different from those now before me. There the defendants had filed their defences and, on the case coming on for hearing in court on a date fixed by consent, counsel for the defendants, who had already been in the case for several months and had drafted and filed the defence, produced a medical certificate as to the illness of one of his witnesses and applied for an adjournment on the ground that, in the absence of that witness, he would be unable adequately to cross examine the plaintiff’s witnesses. Counsel for the plaintiff opposed the application which, after discussion, was refused whereupon the defendants’ counsel withdrew from the case and the hearing continued in his absence. A further point of distinction between that case and the present is that there the application to have that judgment set aside was dealt with under r. 24 of O. IX and not, as here, under the more comprehensive provisions of r. 10.

In my opinion the present case is sufficiently covered by *Mukerjee’s* case (3) and the two Privy Council decisions to which I have referred, and I must disallow the preliminary objection.

It is now necessary to turn to the principal issue between the parties, namely, the question as to whether the judgment of Chanan Singh, J., granting the plaintiff a decree for specific performance should be set aside or varied. At the hearing before me the defendants were not represented by counsel and conducted the proceedings in person, while Mr. Gautama appeared for the plaintiff. Reference was made to the note by Chanan Singh, J., of the evidence given before him by the plaintiff on the formal proof, in addition to which evidence was given before me by means of a number of affidavits sworn by the parties and by the oral testimony of Mr. Place, a partner in the firm of Archer & Wilcock already referred to, who was called and examined on behalf of the plaintiff, and cross-examined by each of the defendants in turn. Before giving his evidence Mr. Place formally claimed privilege on behalf of the defendants insofar as his evidence might relate to matters arising out of instructions received by him or his firm as the defendants’ former advocates. The court thereupon explained to the defendants their position in the matter but each of them expressly waived his right to claim or rely upon such privilege, stating that they had nothing to hide and indicating their willingness that Mr. Place should

give his evidence freely. Neither the plaintiff nor the defendants were cross-examined on their affidavits.

The matter is one of some complexity and certain further facts, additional to those already mentioned, must be set out. It appears that about the month of October or November in the year 1964 the defendants, who had been farming in Kenya for many years, were in negotiation through a firm of land agents known as Dalgety & Co., Ltd., for the sale to the plaintiff of the suit premises consisting of a small farm of land of some nineteen acres in extent at Lower Kabete near Nairobi the land reference number of which is L.R. 5979, together with certain farm machinery and effects, all of which was owned by the defendants as joint tenants. A sale was agreed upon at a price of Shs. 100,000/- and Messrs. Archer & Wilcock proceeded to prepare on behalf of the defendants a draft contract. It would seem that the first draft was not sent out but was replaced by a second draft which on November 12 was forwarded by Messrs. Archer & Wilcock to Mr. N. J. Desai, the advocate then acting for the plaintiff, for his approval. A copy of this second draft was put in evidence (Ex. 12) and shows that the price of Shs. 100,000/- was made up of Shs. 95,000/- for the immovable property and Shs. 5,000/- for the movable. Shortly afterwards this draft was replaced by a third draft (Ex. 13) under which the sale was to include some household furniture at a value of Shs. 2,920/- which brought the total purchase price to Shs. 102,920/-. This draft appears, in turn, to have been replaced by a fourth draft (Ex. A) in which the total price was reduced to Shs. 102,635/-, made up of Shs. 94,000/- for the immovable property and Shs. 8,635/- for moveables including farm machinery, household furniture and effects. There is some uncertainty as to when this fourth draft was prepared and there is an allegation by the defendants that it was executed by the plaintiff, which, however, the plaintiff denies.

In the course of his evidence before Chanan Singh, J., the plaintiff said that his arrangement with the defendants was to be subject to his securing a loan of Shs. 100,000/- from the Land and Agricultural Bank of Kenya, and that when, sometime in December, he was informed by the bank that it was not prepared to make so large an advance he declined to sign the contract. I understood from the defendants that they did not agree that the arrangement was subject to this stipulation but the plaintiff's recollection of the bargain is supported by a letter dated December 1, 1964, written by Mr. Place to Mr. Desai recording what the writer understood to be the terms arrived at on that morning at a meeting said to have taken place between the plaintiff, the first defendant and a representative of Dalgety and Co., Ltd. These terms, as so recorded, included a provision permitting the plaintiff forthwith to enter upon the lands for the purpose of picking and processing coffee on the understanding that the agreement would be signed without delay and that in the event of the bank loan being refused he would immediately vacate the lands. It appears that the plaintiff is still in occupation of the portion of the lands which is under coffee but the precise legal position in regard thereto is not clear.

During the first week of December, 1964, the defendants left Kenya for South Africa with a view possibly to settling there, and before their departure they executed a joint power of attorney in favour of Mr. Place. Neither the original nor a copy of this power was put in evidence but Mr. Place was able to produce from his file what appears to be a draft, undated and unexecuted, which was accepted by the parties as an accurate copy of the power as it was at the time of execution. It is in the form of a general power, unlimited in time and not expressly made irrevocable, and it purports to authorise the donee inter alia to sell all immovable property, chattels and effects then or thereafter belonging to the defendants or either of them, to defend all actions and legal proceedings in which the defendants or either of them may be interested or concerned, to

execute, sign and enter into all such deeds and agreements as shall be requisite in relation to the affairs of the defendants or either of them and generally to act as their agents. It is noteworthy that the donee named is Mr. Place alone, and that it does not refer to him as a partner in the firm of Messrs. Archer & Wilcock or even as an advocate. No reference was made to this power either in the plaint or in the evidence on the formal proof, nor did the learned judge refer to it in his judgment, and it seems to have come to light only recently. Its relevance will be considered later.

The plaintiff's inability to obtain the desired financial accommodation from the bank brought the negotiations to a halt, but they were resumed early in January, 1965, Messrs Makhecha & Waruhiu, who by that time were acting for the plaintiff in place of Mr. Desai, writing to Messrs. Archer & Wilcock on sixth of that month enquiring as to the position. The latter replied on January 8 stating that:

"Unfortunately by reason of the valuation placed upon the property by the Land and Agricultural Bank namely £4,000, it would appear that this sale cannot proceed. Col. McConnell has written that he is not prepared to accept this figure and in fact he himself is returning to Nairobi in the near future."

Meanwhile, on January 7, the first defendant, who was also anxious to re-open negotiations, wrote to Mr. Place suggesting that a solution to the plaintiff's difficulty might be found in a reduction of the proposed purchase price to £4,000 on certain terms and he asked Mr. Place to let him know if anything could be arranged. Messrs. Archer & Wilcock apparently considered that this suggestion was to be treated as a firm proposal and communicated it as such in a letter dated January 14, to Messrs. Makhecha & Waruhiu, saying that "all other conditions would be as in the previous agreement" and adding: "In order to assist you in considering the proposal we are forwarding a copy of the agreement as originally prepared, which will of course require only slight amendments to bring it into line with the new proposals". It is not clear which of the draft agreements was enclosed with the letter.

To this communication the plaintiff's advocates replied on January 16 saying that their client was in agreement with the new proposal and returning the draft agreement "with a request to prepare new agreement in pursuance of the above letter and forward to us for our approval". The defendants' advocates thereupon prepared a draft agreement and on January 19 forwarded it as an engrossment, together with a counterpart to the plaintiff's advocates for execution. The latter, however, in their letter of January 21 stated that the terms of this agreement were acceptable to their client only subject to certain alterations whereupon Messrs. Archer & Wilcock wrote to the first defendant for further instructions. In a reply dated February 2, the first defendant said: "We would accept (subject to confirmation on hearing from you) £4,000 for the farm, including tools and equipment, coffee crop, and furniture Shs. 2,635/-. These amounts to be paid in sterling". Later in the same letter he added: "On hearing from you I will telegraph acceptance or otherwise". The defendants' advocates thereupon wrote on February 8 to the plaintiff's advocates in the following terms:

"Further to our letter of February 3 we have now heard from our clients who state as follows: They will accept Shs. 80,000/- for the farm including tools equipment and coffee crop and Shs. 2,635/- for the furniture making a total purchase price of Shs. 82,635/-. The position therefore is that on payment of this sum, subject of course to the Land Bank Loan and Divisional Board Consent, our client will convey the property to Mr. Kimani but the

rents of the house which is let will, as previously stated, be payable to our clients until December 31 this year. We shall be grateful for your clients comments.”

The plaintiff’s advocates replied to this letter on February 10, saying:

“We are pleased to inform that our client is prepared to accept the total price of Shs. 82,635/-.

We enclose herewith Agreements for sale for necessary amendments and return to us for execution by our client.”

Copies of these two letters were not sent to the defendants and without their knowledge their advocates on February 16, sent to the plaintiff’s advocates two fresh copies of a fresh agreement engrossed for signature, requesting that the plaintiff should sign them, which the plaintiff accordingly did, after which, his advocates, on February 18, returned them to the advocates for the defendants who in turn forwarded them to the defendants for signature. The defendants, in reply, immediately informed their advocates, by letter dated March 2, that the agreement as prepared was unauthorised, pointing out their instructions on February 2 had been that any agreement to be entered into should be conditional upon their confirmation by telegraph and also that payment of the purchase price was to be in sterling, a provision which was omitted from the agreement, and stating that the defendants were definitely not agreeable to sell the property on such terms. They declined to execute the agreement and also declined to execute a formal assignment of the property prepared by the advocates for the purchaser, and neither instrument was ever executed by the defendants.

In the course of his evidence Mr. Place explained that the reason why the draft contract sent to the plaintiff’s advocates on January 19, showed the purchase price at Shs. 88,635/- was because he was not clear in his own mind as to whether the intention was that the plaintiff was to pay a sum of Shs. 6,000/- for certain tools and he gave the defendants what he called “the benefit of the doubt” by including that amount in the purchase price. He further said that when writing to the plaintiff’s advocates in the terms of his firm’s letter of February 8 he considered that he was authorised so to do as the correspondence which had passed between the two firms of advocates during the month of January constituted, in his view, a binding contract subject only to settling the question as to whether the purchase price was to include the tools. This letter is, of course, of vital importance in the case, for the plaintiff, by his advocates’ letter of February 10, purported to accept the offer there put forward and his entire claim in the action springs from the agreement which he says arose from the offer and acceptance contained in those two letters.

I should say here that in my opinion Mr. Place was mistaken in thinking that the prior correspondence had created a binding contract between the parties or that he had the authority of either of the defendants to cause his firm to write the letter of February 8. That letter was expressed to be written “further to our (that is, Messrs. Archer & Wilcock’s) letter of February 3, to the plaintiff’s advocates” and as a result of later instructions. The only later instructions received were those contained in the letter of February 2 in which the first defendant, writing on behalf of himself and his wife, expressly imposed the condition that any offer made was to be subject to their prior acceptance.

Counsel for the plaintiff also sought to rely upon the power of attorney previously given to Mr. Place. The letter of February 8, however, as was the case with all the correspondence addressed to the plaintiff’s advocates, was written by Messrs. Archer & Wilcock acting as the advocates for the defendants and not as advocates for Mr. Place their attorney. If the negotiations at that

stage were being conducted by the latter as a general agent under his power of attorney one would have expected to find the correspondence with the plaintiff's advocates being carried on either by him in person or by Messrs. Archer & Wilcock as his advocates. Furthermore, this point was not taken by the plaintiff before the learned Judge nor is it mentioned in the plaint, and it would be improper for me to entertain it at this stage further than to regard it as possibly raising a further triable issue between the parties.

Although the facts are readily distinguishable the test to be applied here is not unlike that in *H. Clark (Doncaster) Ltd. v. Wilkinson* (5), where the Court of Appeal in England, in giving leave to a defendant to defend in an action for specific performance of what purported to be an agreement for sale of premises signed on his behalf by his solicitor said, in the words of Lord Denning, M.R. ([1965] 1 Ch. at p. 702):

"It was acknowledged to be law before us that a solicitor has no ostensible or apparent authority to sign a contract of sale on behalf of a client so as to bind him when there is no contract in fact. An auctioneer, it was said, has ostensible authority, but a solicitor has not. It would seem, therefore, that if the defendant is to be bound by his contract, then the buyer has to prove that the solicitor had authority *in fact* to sign it. Now here the defendant swore on oath an affidavit that his first solicitor had no such authority. That disclosed a triable issue such as to entitle him to leave to defend in the action."

In the present case the plaintiff seeks to set up a contract arising out of an offer contained in Messrs. Archer & Wilcock's letter of February 8. The defendants deny the authority of their advocates to write the letter and since the onus of establishing that they had such authority is on the plaintiff, there is clearly a triable issue between them.

A second matter which may well give rise to an issue to be tried is the fact that the parties appear to have negotiated at all times on the basis that any arrangements come to were subject to the terms being reduced not only to writing, but to a formal contract to be signed by them. A least four separate drafts of this contract seem to have been prepared during the months of November and December, 1964, and in their letter of January 16, 1965, the plaintiff's advocates indicated that they still required a formal contract. In this connection counsel for the plaintiff referred me to a passage from Cheshire Fifoot's Law of Contract (6th Edn.) at p. 34 and to the decisions in *Branca v. Cobarro* (6) and *Rossiter v. Miller* (7), but there is nothing in those authorities to justify the court in declining to give due weight, if so required, to the manifest intention to be gathered from the course of conduct of the parties and of their advocates. It is not necessary for the purpose of this application that I should determine expressly that the parties were agreed that their negotiations were conditional upon their being reduced to the form of a written contract. All that is required is that I should be satisfied that there is clearly a triable issue as to this if the point should be taken, and upon that there can be no doubt.

It thus appears that each of these two matters, the authority of the defendant's advocates to write the letter of February 8 and the apparent intention of the parties that any arrangements come to between them or their respective advocates should not create a contractual relationship until reduced to a formal agreement duly signed, would constitute a triable issue between the parties and (although the former was mentioned on the hearing of the application for enlargement of time for filing defences) neither was raised before or adjudicated upon by the learned Judge when dealing with the suit on formal proof. A decision in favour of the defendants upon either of these issues might well have resulted in the action being dismissed, and the absence of consideration of these two matters therefore

constitutes a material factor in the passing of the judgment which would almost certainly have been avoided had the hearing not been ex parte.

A plaintiff who, finding that the defendant has entered an appearance but has failed to file a defence within time, elects to proceed to judgment under O.IX, r. 9(2) does so at the risk involved in the possibility of the court subsequently, under rr. 10 or 24 of the same Order, setting aside or varying such judgment. Clearly if he has no reason to suppose that the defendant will seek to have the judgment set aside or varied or if he knows that the defendant has no valid defence to the suit the risk is minimal, but where, as here, the plaintiff in order to obtain his judgment on formal proof has first to defeat an application to the court by the defendant for liberty to file a defence out of time the risk which he undertakes may be increased. It would not perhaps be easy to define with exactitude the several considerations to which the court may properly have regard in dealing with an application under O.IX, r. 10, but it was submitted for the plaintiff that a defendant seeking such relief must show, in the first place, that he was prevented from taking the step in default of which the ex parte judgment was granted, in the second place that he has a good defence to the suit, and, subject thereto, that the test in general is similar to that applicable to an application for leave to file a pleading out of time save that regard should be had to the fact of the plaintiff having, by means of the judgment, acquired a vested right. No authority was cited in support of this proposition and in my opinion it is some what too widely stated. The reference to the defendant having been prevented from taking the proper steps appears to come from r. 24, but that rule makes it mandatory upon the court, in a proper case, to set aside the ex parte decree, whereas r. 10 makes no reference to the defendant having been so prevented and confers upon the court what would appear to be an absolute discretion to be exercised judicially in the light of the facts, circumstances and merits of the particular case.

Looking at O.IX as a whole, and attempting to comprehend the purpose of rr. 10 and 24, it seems to me that a reasonable approach to the application of these rules to any particular case would be for the court, first, to ask itself whether any material factor appears to have entered into the passing of the ex parte judgment which would not or might not have been present had the judgment not been ex parte, and then, if satisfied that such was or may have been the case, to determine whether, in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties, it would be just and reasonable to set aside or vary the judgment, if necessary, upon terms to be imposed.

This leads directly to the question as to whether in the circumstances of the present case this court, in the light of all the facts now before it and in the proper exercise of its discretion, should set aside or vary the terms of the judgment. Perhaps because that discretion is so wide there would appear to be a paucity of authority upon the matter. I understood counsel for the plaintiff to agree that generally speaking the discretion might properly be exercised on lines somewhat similar to those co-opted in *Gatti v. Shoosmith* (8), due allowance being made for the fact that, as the holder, the plaintiff already has a vested interest in the ex parte judgment. In that case, however, the court referred, apparently with approval, to the view of Scrutton and Atkin, L.JJ., in *Wood v. Manchester Corporation* (9) (unreported, but mentioned in the 1939 Annual Practice at p. 1283) that the “vested interest” argument no longer carried the same weight as formerly, and it seems to me that a fortiori in a case such as the present a judgment obtained ex parte under O.IX, r. 9(2) would scarcely create a “vested interest” of any substance.

During the hearing before me several matters were raised upon which it is not necessary for me to express an opinion and the features of the case which seem to merit consideration are the following:

- (a) there appears to be one or more than one triable issue between the parties which, if decided in favour of the defendants, would or might defeat the plaintiff's claim in the suit;
- (b) immediately prior to the passing of the judgment sought to be set aside the defendants, being then out of time for filing their defences, made a bona fide application to the court for leave to file their defences and to stay the passing of the judgment;
- (c) that application was resisted by the plaintiff and was defeated;
- (d) the arguments put forward by the plaintiff in resisting the application included the submission that, in the event of the judgment now sought to be set aside being passed, the defendants would be able to apply to the court to have it set aside, which submission the judge appeared expressly to accept;
- (e) the period by which the defendants were out of time in filing their defences was, at the date of the plaintiff's request to have the matter set down for formal proof, some five or six days and, at the date of the passing of the judgment, between six and seven weeks;
- (f) the mistakes and misunderstanding that have led to the present position between the parties cannot, in fairness, be attributed solely to the defendants personally;
- (g) no irreparable injury appears likely to result to the plaintiff, in the event of the judgment being set aside, which cannot effectively be provided against by the order of the court.

Taking all these matters into account and endeavouring to apply the principles which I ventured to state I am of the opinion that the judgment dated September 20, 1965, should be set aside in its entirety upon such terms as may be just. I will now hear the parties as to the terms including costs.

Application allowed, ex-parte judgment set aside on condition that defence filed within 28 days.

The defendants appeared in person.

For the plaintiff:

Satish Gautama, Nairobi

Tarlok Singh Nayar & another v Sterling General Insurance Company Ltd [1966] 1 EA 144 (SCK)

Division:	Supreme Court of Kenya at Nairobi
Date of judgment:	21 May 1964
Case Number:	1080/1963
Before:	Chanan Singh J
Sourced by:	LawAfrica

obtained by third party against authorised driver only – Whether right of indemnity enforceable by authorised driver against insurance company under an implied trust.

[2] Contract – Motor insurance – Parties – Enforcement by stranger under an implied trust.

[3] Estoppel – Estoppel by conduct – Insurance company defending claims against authorised driver – Admission of a point of law not a basis for estoppel.

Editor's Summary

The defendant insurer issued a comprehensive motor insurance policy to the first plaintiff (called “the insured”) by which it agreed to “indemnify the Insured . . . against all sums which the Insured shall become legally liable to pay . . .” and also, for a further consideration, agreed to “indemnify any Authorised Driver . . .”. The insured lent the car to the second plaintiff, who was driving it as an authorised driver under the policy, when it was involved in an accident in which a passenger was injured. The passenger recovered damages and costs from the second plaintiff, the insurers having taken over his defence. The insured and the second plaintiff sued the insurers claiming a declaration that the insurers were bound to indemnify them in respect of all liability they were or may be under to the passenger. The insurers defence was based on the absence of any legal liability incurred by the insured and on the want of privity of the second plaintiff with the insurers under the policy. The plaintiffs attempted to found an estoppel on the fact that the insurers conducted the second plaintiff's defence against the claims of the injured passenger. The insured gave evidence that he could have saved part of the premium by insuring the car for his personal use only.

Held –

- (i) the insured, having entered into the contract of insurance on his own behalf and on behalf of the authorised driver, could sue on it either as a party or as a trustee for the authorised driver;

Williams v. Baltic Insurance Association, [1924] 2 K.B. 282: All E.R. Rep. 368 followed.

Vandepitte v. Preferred Accident Insurance Corporation, [1933] A.C. 70 distinguished.

- (ii) the second plaintiff, being a stranger to the contract, could not himself sue on it, although he could sue through the insured as his trustee or direct if the trustee refused, but this point did not arise because the insured/trustee was the first plaintiff;

Kshirodebihari Datta v. Mangobinda Panda (1934), 61 Cal. 841 disapproved.

- (iii) the insurers' conduct in taking over the second plaintiff's defence amounted to an admission on a point of law and could not found an estoppel in the present action.

Declaration as prayed. Judgment for the plaintiffs as prayed.

Cases referred to in judgment:

- (1) *Tweddle v. Atkinson* (1861), 121 E.R. 762.
- (2) *Dunlop v. Selfridge*, [1915] A.C. 849.
- (3) *Smith v. River Douglas Catchment Board*, [1949] 2 K.B. 500; 2 All E.R. 179.
- (4) *Scruttons v. Midland Silicones*, [1962] 1 All E.R. 1.
- (5) *Kshirodebihari Datta v. Mangobinda Panda* (1934), 61 Cal. 841.
- (6) *Jumna Das v. Ram Autar Pande* (1912), 39 I.A. 7.
- (7) *Coward v. Motor Insurers Bureau*, [1962] 1 All E.R. 531.
- (8) *Williams v. Baltic Insurance Association*, [1924] 2 K.B. 282; All E.R. Rep. 368.
- (9) *Vandepitte v. Preferred Accident Insurance Corporation*, [1933] A.C. 70.
- (10) *Colyer v. The Countess Mulgrave* (1836), 48 E.R. 559.
- (11) *Davenport v. Bishop* (1843), 63 E.R. 201.
- (12) *Leopold Walford v. Les Affréteurs Réunis Société Anonyme*, [1918] 2 K.B. 498.
- (13) *Robertson v. Wait* (1853), 8 Ex. 299.
- (14) *West v. Houghton* (1879), 4 C.P.D. 197.
- (15) *The Nuova Raffachina* (1871), L.R. 3, A. & E. 483.
- (16) *Muthuswami v. Loganatha* (1935), A.I.R. Mad. 404.

Judgment

Chanan Singh J: The real point involved in this case is a short one: Can an “authorised driver” claim indemnity under a motor car insurance policy? The contention of the insurance company is that the policy is a contract to which only the insured is a party and only the insured can claim to be indemnified under it; if a person driving with the permission of the insured is involved in an accident, he cannot claim indemnity because he was not a party to the contract of insurance; the insured cannot claim it because he has incurred no liability.

Mr. Tarlok Singh Nayar, the first plaintiff, insured his car Peugeot 403 station wagon No. KGR 677 with the defendant company. I shall call the two parties the insured and the insurers respectively. The policy was a comprehensive one, not limited to the risks required to be compulsorily covered by the Insurance (Motor Vehicles Third Party Risks) Act (Cap. 405).

During the currency of the policy the insured lent his car to Mr. Inderpal Singh, the second plaintiff, whom I shall call the claimant. The car was involved in an accident while being driven by the claimant on January 31, 1961, and Mr. G. S. Brar (a passenger in the car) was injured. Mr. Brar filed an action (Civil Suit No. 711 of 1962) against the claimant and two other parties, and was awarded damages amounting to Shs. 47,006/50 and interest and costs against the claimant who was also ordered to indemnify Mr. Brar in respect of the costs of the other two defendants.

The present suit claims (i) a declaration that the insurers are bound to indemnify both the insured and the claimant in respect of all liability they are or may be under to Mr. Brar or to the other two defendants sued by him in civil suit No. 711 and (ii) judgment for the amounts that the insured or the claimant have to pay in the said civil suit. Costs and interest are also claimed.

The defence of the insurers in effect is that the insured has incurred no liability in civil suit No. 711, the judgment being against the claimant alone, and that, therefore, the insured cannot, and does not need to claim indemnity for liability arising out of that case. The claimant has incurred liability but he, being a stranger to the contract of insurance, cannot claim indemnity because of the principle

that a contract creates rights and liabilities personal to the parties and that strangers can claim no rights under the contract.

Section 2 of the insurance policy in this case (Ex. 1) deals with “Liability to Third Parties”. Leaving out parts that are either not applicable or not in question, the insurers agreed in para. 1 to “indemnify the insured in the event of accident . . . against all sums . . . which the insured shall become legally liable to pay”. Paragraph 2 reads: “In terms of and subject to the limitations of and for the purposes of this section the company will indemnify (a) any Authorised Driver who is driving the Motor Vehicle provided that such Authorised Driver (1) shall as though he were the insured observe fulfill and be subject to the Terms of this Policy insofar as they can apply (ii) is not entitled to indemnity under any other policy.”

It seems clear that the insurer undertook to indemnify against “liability to third parties” two distinct persons, namely “the insured” and “any Authorised Driver”. The policy even goes on to say that the insurer will indemnify “in respect of the liability incurred by such person” his personal representatives “in the event of the death of any person entitled to indemnity”. The words used are “any person entitled to indemnity” and “such person”. The indemnity was obviously intended to protect the estate of the insured and the estate of any authorised driver in case of death.

The schedule to the policy which gives various particulars and definitions appears to have been prepared in a moment of absent-mindedness because it defines the term “Authorised Driver” as “Any of the following: (a) The insured, (b) Any person provided on the insured’s order or with his permission.” The driver is required to have a current driving licence. Thus, while Section II of the policy makes a distinction between “the insured” and the “Authorised Driver”, the schedule includes them both in the term “Authorised Driver”.

This confusing definition does not, however, alter the operative part of the policy which contains a clear agreement to the effect that in the event of an accident the insurer would indemnify the insured and the authorised driver.

In the present case, there is evidence, which is uncontradicted and which I accept, that the claimant was at the material time driving the car with the permission of the insured. I find that he was an “Authorised Driver” within the meaning assigned to this term by the policy of insurance.

The condition that the driver must be in possession of a valid licence was complied with. The claimant produced his driving licence as an exhibit. There is also evidence, which I accept, that the claimant fully co-operated with the insurers in defending the civil suit the judgment in which has given rise to this claim.

Section 4(1) of the Insurance (Motor Vehicle Third Party Risks) Act (Cap. 405) makes it unlawful for any person “to use, or to cause or permit any other person to use” a motor car on a road unless there is in force a policy of insurance “in relation to the user of the vehicle by that person or that other person.” Under s. 5(b), the insurance policy must be one which “insures such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of, or bodily injury to, any person caused by or arising out of the use of the vehicle on a road.”

Thus, the insurance policy to be valid under this Act must cover every person who uses the vehicle on a road whether he is the policy-holder himself or is a person permitted by the policy-holder to use it. In order to comply with the requirements of the Act, it is not however necessary for the policy to cover

liability in respect of the death of or bodily injury to all persons. In particular, it is not

necessary to cover “passengers” unless they are being carried “for hire or reward” or “by reason of or in pursuance of a contract of employment.”

There is no evidence that Mr. Brar was being carried for hire or reward or by reason of his employment. The particular risk which gave rise to the present case was not, therefore, one which was compulsorily required to be covered by the statute governing the insurance against third party risks. The case has to be decided purely on the basis of the terms of the insurance policy interpreted in accordance with the general law of contract.

The insured stated in evidence that he could save part of the premium by insuring the car for his own personal use only but that he knew that the car would have to be used by others and preferred to pay the extra premium. The exact words used by him were. “I contemplated plaintiff 2 to be one of the authorised drivers. Second plaintiff was driving with my consent and permission when the car was involved in an accident on 31/1/61.” This evidence is uncontradicted.

When the accident took place, the matter was reported to the insurers. A claim form was completed and submitted by the insured. The summons in the civil suit filed by Mr. Brar was handed to the insurers. Messrs. Verjee & Verjee who acted for the claimant in that case were appointed and paid by the insurers. In effect, the insurers had taken over and conducted the defence as they thought best. This they were entitled to do under the terms of the policy, not otherwise. When judgment was passed against the claimant, the insurers gave notice of appeal but then decided, without consulting the claimant or the insured, not to lodge the appeal. Later, it appears the insurers came to the conclusion that the claimant had no right to the indemnity provided for in the policy. Nevertheless, they offered to pay Mr. Brar fifty per cent. of the value of his judgment in full and final settlement. This offer was not accepted.

I find the following facts proved:

- (i) The insurer had agreed to indemnify the insured against liability in terms of the policy.
- (ii) The insurer had agreed to indemnify any authorised driver driving with the permission of the insured.
- (iii) The claimant was an authorised driver in terms of the policy.
- (iv) The insured had foregone a reduction in the premium by asking for the extension of indemnity to authorised drivers. This constituted consideration for the extension.

Two case of indemnity might be distinguished here. First an insurance company might agree to indemnify an insured against liability to third parties incurred by him while the car was driven either by himself or by somebody authorised by him. In this case, no legal difficulty would arise and the insured would be entitled to sue for indemnity.

Secondly, an insurance company might agree to indemnify the insured as well as his authorised driver as two distinct individuals or one individual and a class of individuals. This is the position in the present case. There is no question but that the insurers agreed to indemnify the authorised driver. In other words, indemnity was promised for consideration and I am satisfied that the circumstances in which the policy contemplated the provision of indemnity have arisen. The insurers, if they paid, would be carrying out their obligation under the contract and would not be infringing any principle of law or morals.

The only question is whether the authorised driver (that is, the claimant) can enforce by court action the right which the insured purchased or thought he purchased for him from the insurers.

Doubts on this matter appear to have arisen in England about a hundred years ago in view of some old decisions which supported the proposition that a

stranger to the contract and consideration may maintain an action upon the contract if he stands in such a relationship to the contracting party that it may be considered that the contract was made for his benefit and that, therefore, he may be considered to be a party. *Tweddle v. Atkinson* (1) put these doubts at rest by deciding that a stranger to the consideration cannot sue on a contract. This view was confirmed by *Dunlop v. Selfridge* (2).

Referring to the principle established by these two cases, Denning, L.J. (as he then was) stated in *Smith v. River Douglas Catchment Board* (3) ([1949] 2 K.B. at p. 514) in his usual forthright manner:

“It has never been able entirely to supplant another principle whose roots go much deeper. I mean the principle that a man who makes a deliberate promise which is intended to be binding, that is to say, under seal or for good consideration, must keep his promise, and the court will hold him to it. not only at the suit of the party who gave the consideration, but also at the suit of one who was not a party to the contract, provided that it was made for his benefit and that he has a sufficient interest to entitle him to enforce it, subject always, of course, to any defences that may be open on merits.”

This view was rejected by the House of Lords in *Scruttons v. Midland Silicones* (4) by majority, Lord Denning himself being the minority. He valiantly and vigorously protested against a principle which although now called “fundamental”, was finally introduced into English law only in the nineteenth century.

Lord Simonds, however, pointed out in the *Scruttons* case (4) (at p. 7) that the principle in question is so well established that it can be changed only by legislation. Therefore, I reluctantly come to the conclusion that what Lord Denning propounded in the *Smith* case (3), is not what the law is in England but what it should be.

Counsel for the plaintiffs has also argued that at the date this contract was formed the Indian Contract Act applied to this country and that under that Act the position is different because the definition of the term “consideration” in it is wider. That definition reads as follows:

“When at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise.”

Under this definition it is not necessary that consideration must move from the promisee because it can come from “any other person”. This certainly makes the definition wider than that in English law but is not of any assistance in the present case because, here, the consideration did in fact, move from the promisee (Mr. Tarlok Singh Nayar the first plaintiff). This definition would have been of help if the consideration had moved from another person. In any case the definition disposes of only one of the principles of English law, namely that consideration must move from the promisee.

There is another principle of English law, namely that only a party to a contract can sue on it. This has not been cut out by the definition of “consideration”. As is clear from the wording of the preamble, the Indian Contract Act is not a complete code of the law of contract and there is room for importing into it principles on subjects not covered by it. See “Indian Contract Act” by Pollock and Mulla (8th Edn., p. 6). The principle that a stranger to a contract cannot sue on it had been established nine years (by the *Tweddle case* (1), *supra*) when the contract Act was enacted and if it had been intended that it should not be extended to India, the legislature would have said so in the same way as it

made its intention clear in regard to the twin principle that consideration must move from the promisee.

In support of his contention that the Indian law is different from English law not with regard to one only of the two principles but with regard to both, counsel for the plaintiffs has quoted *Kshirodebihari Datta v. Mangobinda Panda* (5). In that case, a landlord had let certain land to a tenant at an annual rent of Rs. 220. The tenant had given a sub-lease to a sub-tenant at the increased annual rent of Rs. 520. The sub-lease had provided that the sub-tenant was to pay Rs. 220 every year to the landlord and the balance of Rs. 300 to the tenant handing to him at the same time the landlord's receipt for Rs. 220 and the tenant was, then, to give the sub-tenant a receipt for the total sum of Rs. 520. The sub-tenant paid for some years in accordance with his agreement but then defaulted. The usufructuary mortgagee of the landlord sued the tenant, and on the latter's application the sub-tenant was added as a defendant.

The case went up to the Calcutta High Court on second appeal: Lort-Williams, J., argued on the lines on which Lord Denning was to argue fifteen years later in the *Smith* case (3) and twenty-seven years later in the *Scrutton's* case (4). He discussed many cases both Indian and English (including *Tweddle v. Atkinson* (1) and *Dunlop v. Selfridge* (2)). He showed how courts had allowed third parties to sue by introducing into contracts the idea of a trust that is by holding that the promise had contracted as trustee for the third party. He then came to the conclusion: "In England it has often been by fiction that old rules have been avoided, discredited, and finally broken down . . . There seems to be no similar necessity for importing these anomalies into India." He gave judgment for the plaintiff against the sub-tenant and made certain other orders which do not concern us here. The other judge, Ghore, J., was "inclined to hold that the plaintiff should be given a decree against" the tenant and that the tenant "should be left to sue" the sub-tenant "in a separate suit". That would have been perfectly in accordance with the principles of English law of contract but he agreed with Lort-Williams, J., because any suit that the tenant brought against the sub-tenant would now have been time-barred.

The true position, as I understand it, however, is that the *Kshirodebihari Datta* case (5) is not good law. See Pollock & Mulla (op. cit., pp. 21-2). It is directly opposed to the Privy Council case of *Jumna Das v. Ram Autar Pande* (6). The short judgment of the Board in that case was as follows: "This is a perfectly plain case. The action is brought by a mortgagee to enforce against a purchaser of the mortgaged property an undertaking that he entered into with his vendor. The mortgagee has no right to avail himself of that. He was no party to the sale. The purchaser entered into no contract with him, and the purchaser is not personally bound to pay the mortgage debt . . ."

Crompton, J., in the *Tweddle* case (1) raised the point of absence of mutuality between the promisor and the third party. He said: "It would be a monstrous proposition to say that a person was a party to the contract for the purpose of suing upon it for his own advantage and not a party to it for the purpose of being sued." If the insurers in the present case, tried to sue the claimant upon the contract of insurance would they have an answer to the objection that there was no privity of contract between them? If not, how can the claimant sue at all?

It is clear, therefore, that a stranger to a contract cannot sue on it either in India or in England or in Kenya. There is an exception to this general rule in England in so far as motor insurance is concerned. Section 206(3) of the Road Traffic Act, 1960, provides: "Notwithstanding anything in any enactment, a person issuing a policy of insurance under s. 203 of this Act shall be liable to indemnify the persons or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of those persons or

classes of persons.” This provision was first introduced into English law as s. 36(4) of the Road Traffic Act of 1930. It means that an authorised driver of the insured can sue the insurer for indemnity if the policy provides for such indemnity. No provision like this exists in Kenya. In England, there is also an agreement between the Motor Insurers’ Bureau and the Minister of Transport under which the Bureau indemnifies authorised drivers in cases not otherwise covered subject to certain conditions. But both s. 206(3) of the 1960 Act and the agreement apply, it seems, to cases of compulsorily insurable risks. The liability arising out of the carriage of passengers without “hire or reward” is not such a risk and the claimant’s case would not have an easy answer even in England. See s. 5, proviso (ii), of our Insurance (Motor Vehicles Third Party Risks) Act (Cap. 405) and the case of *Coward v. Motor Insurers Bureau* (7).

In the present case, the insured was a party to the contract. He paid the premium. He was entitled to a reduction in the premium if the car was to be driven by himself alone. But he deliberately decided not to take this rebate because he contemplated the use of the car by the claimant as one of his authorised drivers. Therefore, whatever the position of the claimant, why cannot the insured himself sue? He is in effect saying to the insurers: “You took premium from me for indemnifying both myself and my authorised driver in the event of an accident. I now ask you to indemnify my authorised driver.” If the insurers reply – as indeed they do – that the claimant will not be indemnified because he was not a party to the contract, are the insurers not committing a breach of their contract with the insured? Is their action not a fraud on the insured because he was made to part with money on the understanding that the insurers would indemnify the authorised driver of the claimant? If the insurers were not to indemnify the authorised driver, why did they take the extra premium?

I think the insured is within his rights in bringing this action, in so far at least as the prayer for a declaration is concerned. As a party to the contract, he is entitled to ask that the insurers having received good consideration must carry out their promise to indemnify his authorised driver against liability. That is one aspect of the matter.

The other aspect is emphasised by such cases as *Williams v. Baltic Insurance Association* (8). There, the plaintiff had taken out a policy of insurance by which the insurers agreed to indemnify him “against all sums for which the insured (or any licensed personal friend or relative of the insured while driving the car with the insured’s general knowledge and consent) shall become legally liable in compensation for . . . accidental bodily injury caused to any person.” The plaintiff’s sister (who was a licensed driver) was driving the car with his consent when personal injuries were caused to third persons who recovered damages against her. The plaintiff claimed that the insurers were liable under the policy to indemnify his sister and to pay to her or to him as trustee for her the amount of those damages.

The clause in the policy, although differently worded, is to the same effect as the clauses in the policy in the present case. In fact, in the present case the policy is more clearly worded in that the promises to indemnify the insured and his authorised driver are contained in two separate paragraphs. There was room in the *Williams* case (8), for the argument – which was put forward – that the agreement was to indemnify only the insured against liability incurred by him when he was driving himself or when one of his authorised drivers was driving. That argument was rejected. In the present case, there is no room for such an argument and it was not put forward, learned counsel confining himself – I think wisely – to the more fundamental argument that a third party could not claim under the contract.

Roche, J., giving judgment in the *Williams* case (8) stated: “I hold without the slightest hesitation that the plain meaning of the clause is that it covers the

very thing that happened.” In one of the last paragraphs of the judgment, the learned judge said this:

“The general argument that Mr. Bransby Williams cannot recover for Miss Bransby Williams because the latter cannot recover for herself, is based upon this, that the insured is Mr. Bransby Williams. That, I think is begging the question. Mr. Bransby Williams is the insured in the sense that he is the person who effected the insurance but it is an insurance for himself and the other persons mentioned in cl. 2, and accordingly, the company’s contract is to indemnify all such persons in the event of those things happening against which the insurance is effected. The principle of *Waters v. Monarch Fire and Life Assurance Co.* in that matter also applies here.”

In the result, the award made by arbitrators in favour of the insured was allowed to stand.

The facts in the *Williams* case (8) are almost the same as in the present case. There, the authorised driver was the insured’s sister. Here, it was the sister’s husband. There the injured third party had obtained a judgment against the sister. Here the injured third party has obtained a judgment against the sister’s husband. The insured’s evidence in the present case, which is uncontradicted, is this: “I approached the agents of defendant. I took out a policy to cover myself and any driver driving with my permission. I expected other people to drive. There was a suggestion that if I was to be the only driver the premium would be less. I contemplated the second plaintiff to be one of the authorised drivers. Second plaintiff was driving with my consent and permission when the car was involved in an accident on 31/1/61.”

The conclusion at which Roche, J., arrived in 1924 seems inescapable in the present case. But my attention has been drawn to *Vandepitte v. Preferred Accident Insurance Corporation* (9) which was a Privy Council case from British Columbia. There, the injured third party had sued the insurance company direct and their Lordships held that the provisions of s. 24 of the British Columbia Insurance Act, 1925, which applied in that case were not “satisfied by anything but a contract at law, enforceable directly against the insurers by the insured in her own name” ([1933] A.C. at p. 81). In the present case, the insured himself is suing in his own name.

In the *Vandepitte* case (9), their Lordships referred to the *Williams* case (8) and distinguished it on the basis of “facts” and “contractual terms”. They did not say it was not good law. In fact, they referred to the principle “that a party to a contract can constitute himself a trustee for a third party of a right under the contract and thus confer such rights enforceable in equity on the third party” ([1933] A.C. at p. 79) but held “that no trusteeship is here made out” (ibid. at p. 81) and stated that there was no evidence that the insured “had any intention to insure anyone but himself” (ibid. p. 78).

In the present case, we have evidence that the insured did want to insure himself as well as his authorised drivers. He had the claimant particularly in mind. He decided to forego, on reduction in premium in order to cover his authorised drivers against liability arising out of accidents.

Counsel for the defendant argued that the *Vandepitte* case (9) is binding on me and that, because it is inconsistent with the *Williams* case (8), I am entitled to ignore the latter. With respect to learned counsel, I cannot accept this argument. The Privy Council was concerned largely with the provisions of a special statute. It decided that the injured third party had no right to sue on the contract or under the terms of the statute in question and also that no trust had been made out. Admittedly, it also stated that Roche, J., in the *Williams* case (8) did not make it clear whether he “treated the driver of the car as directly insured or as a cestui

que trust” but that cannot make the decision wrong. The editors of the *Law Reports*, [1924] 2 K.B., summarised the case by saying that the insurers were liable to pay to the insured “as trustee for his sister”. 22 Halsbury’s Laws (3rd Edn.) p. 360, states that: “it is possible to show that the assured, when making the contract, intended to act as agent or trustee of the permitted driver. The authority quoted is the *Vandepitte* case (9) and the reader is asked to compare with it the *Williams* case (8) “where enforcement by the assured on behalf of the permitted driver was allowed” – Note (i).

I do not think it matters at all whether or not the learned judge named the branch of law under which he acted. I think his decision is based on the principles of equity. What is important, however, is that it has never to my knowledge been suggested the case is not, or is no longer, good law. It is referred to nine times in 22 Halsbury’s Laws (3rd Edn.), ten times in MacGillivray on Insurance Law (5th Edn.), twice in the 1950 edition of vol. 12 of the English and Empire Digest, and twice in the 1963 edition of vol. 29 of the Digest.

There is another group of decisions to the - same effect as that in the *Williams* case (8). In each case there was a contract from which a third party stood to benefit and in each case one of the parties was permitted to sue in trust for the third party. These may now be briefly considered.

In *Colyear v. The Countess Mulgrave* (10) it was decided that where two persons, for valuable consideration as between themselves, covenant to do some act for the benefit of a mere stranger, that stranger cannot enforce the covenant against the two, though either of the two might do so against the other. Seven years later another case was decided. That was the case of *Davenport v. Bishop* (11) in which B had agreed with A, in a settlement made in contemplation of marriage with A, to convey any property she might get to such uses and purposes as she might appoint, and in default of appointment, to herself for life, with remainder to A for life, with remainder to the children of B, and if there be no children to the use of M.L. B did get property but made no appointment so that the property went to her heir at law C. A sued C and the trustees of the settlement. It was held that the covenant must be carried into execution in to and that the ultimate limitation to M.L., though a stranger to the settlement, must also take effect.

A case more directly to the point was *Leopold Walford v. Les Affréteurs Réunis Société Anonyme* (12). There, a charterparty entered into between the shipowners and the charterers provided for the payment of a commission to brokers. The brokers, Leopold Walford, who were not a party to the contract, sued the shipowners for their commission. The difficulty caused by the principle that a non-party cannot sue on a contract was got over by treating the case as though it had been brought by the charterers (the Lubricating Fuel Oils Co. Ltd.) and then it was held that the charterers were entitled to sue for commission as trustees for the brokers. Pickford, L.J., relied on *Robertson v. Wait* (13), *West v. Houghton* (14) and *The Nuova Raffachina* (15). He stated: the *Robertson* case (13) “has never been disapproved” and “The principle established in that case appears to me to be right”. Bankes, L.J., agreed, adding: “That that is possible, and that the contract inserted in the charterparty between the charterers and the shipowners can be treated as a contract made by the charterers in the interests of the brokers and on which they, the charterers, can sue as trustees for the brokers, must be taken to be established law since the decision in *Robertson v. Wait* (13), a decision which has never been questioned.” Scrutton, L.J., referred to the usual objection that the brokers were not a party to the contract and stated: “That objection, which has existed so long as I have been at the Bar, has always been avoided, on the authority of *Robertson v. Wait* (13), by the charterers suing as trustees for the brokers or by the shipowners not taking the objection that the

brokers were not parties to the charterparty. In this action it was agreed that it should be treated as though the charterers were suing. *Robertson v. Wait* (13) has never, so far as I know, been questioned.”

It should be observed that this last, namely the *Walford* case (12), was decided nearly sixty years after the *Tweddle* case (1). It was a Court of Appeal judgment and none of the three judges had any hesitation in saying that one of the parties could sue on behalf of the third party.

Counsel for the plaintiffs on the second day of hearing has also argued that the insurers are estopped from denying that they are liable to the claimant on the contract because they took out of his hands the defence of the civil case filed against him by Mr. Brar. This, counsel stated, was done under the terms of the policy: it could not be done otherwise. They employed their own lawyer and conducted the defence as they liked and in effect deprived him of the right and opportunity of defending himself as he might be advised in his own interest, as distinct from the interest of the insurance company.

In my opinion, all that the conduct of the insurers means is that at one stage they thought they were liable on the policy. Later, on reconsideration or legal advice they came to the conclusion that they were not in fact liable. Their conduct is, thus, explainable on the basis that their understanding of their legal rights was different when they undertook to defend the claimant. Their earlier conduct amounted in effect to an admission on a point of law and this does not create estoppel – *Muthuswami v. Loganatha* (16). I must, therefore, hold against counsel on this point. Other grounds on which the argument from estoppel (so far at least as the insured is concerned) would fail are those mentioned by the Privy Council in *Vandepitte v. Preferred Accident Assurance Corporation* (9) where it was held that, in circumstances similar to those in this case, the insurers were not estopped from denying liability even to the authorised driver whose defence the insurers had undertaken.

In the result, I find that the insured entered into the contract both on his own behalf and on behalf of his authorised drivers, particularly the claimant. Under the terms of the policy, the insurers agreed to indemnify against liability both the insured and his authorised drivers which class included the claimant. The insured is entitled to maintain this suit either as a party to the contract or as trustee for the claimant. The claimant himself could not sue on the contract but as a cestui que trust he could sue through his trustee, the insured, or direct if the trustee refused, in which event he would have to make him a party to the suit as a defendant. Since the trustee is a plaintiff, the question of the claimant’s right to sue on the basis of the trust does not arise.

I, therefore, grant the insured the declaration he seeks namely that the insurers are bound to indemnify him or the claimant or both against all liability whether in respect of damages or costs or interest arising out of the accident on January 1, 1961 in which the passenger Gurdial Singh Brar was injured.

I also enter judgment for the insured (Mr. Tarlok Singh Nayar) as trustee for the claimant (Mr. Inderpal Singh) for such sum or sums as may be payable by the claimant to the plaintiff and to his co-defendants (either as damages or as costs or interest) in Civil Case No. 711 of 1962.

The plaintiffs will have the costs of this action. I grant the plaintiffs the necessary certificate for two Counsel.

Declaration as prayed. Judgment for the plaintiffs as prayed.

For the plaintiff:

Shah & Shah, Nairobi

Mackie Robertson Q.C., Ramnik Shah and K. C. Gautama

For the defendant:

Robson, Harris & Co., Nairobi

P. J. Wilkinson Q.C., and H. Makhecha

**Coast Brick & Tile Works Limited & others v Premchand Raichand Limited
& another**
[1966] 1 EA 154 (PC)

Division:	Privy Council
Date of judgment:	31 January 1966
Case Number:	32/1964
Before:	Lord Morris, Lord Upjohn and Lord Pearson
Sourced by:	LawAfrica
Appeal from:	E.A.C.A. Civil Appeal No. 37 of 1962 on appeal from the High Court of Kenya – Rudd, Ag. C.J.

[1] *Money-lender – Loan – Repayment of principal and interest charged upon land – Some advances made before execution of charge – Whether independent transactions – Additional security provided – Whether transaction exempted from Money – Lenders Ordinance – Meaning of “the security” – Money – Lenders Ordinance, s. 3(1)(b), (K).*

[2] *Land registration – Attestation of charge – Attestation complied with s. 58 of Registration of Titles Ordinance – Whether non-compliance with s. 59 of Indian Transfer Property Act, 1882, fatal.*

Editor’s Summary

The first appellant had borrowed Shs. 1,000,000/- from the first respondent which was a licensed money-lender, and repayment of this sum together with interest was secured by a charge on land of the first appellant at Mombasa. By the same document seven individuals guaranteed the principal and interest. The principal sum was advanced in eight different instalments of varying amounts six of them well before the charge was executed. A substantial part of the principal amount and interest being seriously in arrear, the first respondent brought a mortgage suit for what was due and, in default of payment for sale of the land charged. The High Court gave judgment in favour of the first respondent as did the East African Court of Appeal. The appellants further appealed and the substantial issues were (a) that as six instalments were advanced before the execution of the charge, these advances must be treated as a series of independent unenforceable transactions unless they fell within the exempting words of s. 3(1)(b) of the Money-Lenders Ordinance, (b) that alternatively, s. 3(1)(b) applied only where the whole or sole security was one falling within the section and that as an additional security was provided by the guarantors and by a charge on certain shares, the section did not exempt the transaction from the provisions of the Ordinance, and (c) that though the seal of the respondents was properly affixed in

accordance with the articles of association, to constitute a valid mortgage this was not sufficient and the seal should have been affixed in the presence of two additional independent witnesses as required by s. 59 of the Indian Transfer of Property Act 1882.

Held –

- (i) each advance by an instalment was part of one overall transaction that envisaged the securing of all advances by the charge;
- (ii) the Money-Lenders Ordinance was designed to protect the public from money-lenders but it seemed reasonably clear that the legislature thought that a borrower would require no such protection if the security was of a chattel interest and interest was limited to 9 per cent. per annum or without such limitation of interest if the security was upon immovable property;
- (iii) the words “the security” in s. 3 *ibid.* should be read as “a security”;
- (iv) section 1(2) of the Registration of Titles Ordinance made it plain that s. 58 of that Ordinance was a complete code for the purpose of attestation of

instruments thereby required to be registered and therefore the latter overrode s. 59 of the Indian Transfer of Property Act 1882 and the charge was valid as its attestation complied with s. 58 of the Registration of Titles Ordinance.

Appeal dismissed.

Cases referred to in judgment:

- (1) *S. N. Shah v. C. M. Patel and others*, [1961] E.A. 397 (C.A.).
- (2) *Buganda Timber Co. Ltd. v. Mulji Kankji Mehta*, [1961] E.A. 477.
- (3) *Deffell v. White*, C.R. 2 C.P. 144.

Judgment

Lord Upjohn: Between December, 1955 and February, 1956 the first appellants, Coast Brick & Tile Works Limited, a private company incorporated in Kenya, borrowed Shs. 1,000,000/- from the first respondents who are licensed money-lenders. Repayment of that sum was, together with interest thereon at the rate of 16 per cent. per annum (reduced in 1959 to 12 per cent. per annum), by a document expressed to be dated January 31, 1956, charged upon certain land in the neighbourhood of Mombasa belonging to the first appellants. Their lordships will refer to this document as the Charge. Repayment of the principal and interest was by the same document guaranteed by seven individuals, six of whom are the second to seventh appellants (the remaining guarantor never having been served with any proceedings) and one of whom also charged certain shares in the first appellants with repayment of the debt and interest. The second respondent is a holder of an admittedly valid second mortgage on the premises charged by the Charge and was joined because he had an interest in the property, no relief being claimed against him. He has not appeared before their lordships' Board.

Although by the terms of the Charge the principal sum was repayable by ten instalments of Shs. 100,000/- each at varying dates between October 31, 1956 and October 31, 1959, together with interest thereon, only Shs. 40,000/- have been repaid on account of principal leaving Shs. 960,000/- due on that account, and interest is very seriously in arrear. So by a plaint dated September 21, 1960 the first respondent (who will be referred to as the respondents for the remainder of their lordships' judgment) sued the appellants for an account of what was due to them and for sale of the land charged. The appellants, by their defence, set up a number of defences and the action was tried before Rudd, Ag. C.J. for seven days in February, 1962 and on March 16, 1962 he delivered a reserved judgment in favour of the respondents and made an order for the usual preliminary mortgage decree with costs.

The appellants appealed to the East African Court of Appeal which appeal was dismissed on March 5, 1964. Before the Acting Chief Justice much time was occupied with evidence as to the attestation of the signatures of the guarantors and with certain other matters pleaded in the defences, all of which he decided against the appellants. In the Court of Appeal some time was also spent upon the question of attestations of the guarantors' signatures but these matters have not been pursued before their lordships and in the end the real and substantial issues between the parties were as follows: –

First the respondents were admittedly money-lenders and prima facie the transaction was a money-lending transaction to which the Money-Lenders Ordinance would apply unless exempted by s. 3

of the Ordinance. Unless so exempted it was common ground that the Charge was unenforceable for

none of the provisions of s. 11 of the Ordinance (which requires a note or memorandum in writing of the contract to be made and signed personally by the borrower within seven days of the making of the contract) had been complied with.

Section 3 of the Ordinance is in these terms:—

“3.(1) The provisions of this Ordinance shall not apply –

- (a) to any money-lending transaction where the security for repayment of the loan and/or interest thereon is effected by execution of a chattels transfer in which the interest provided for is not in excess of nine per cent. per annum;
 - (b) to any money-lending transaction where the security for repayment of the loan and/or interest thereon is effected by execution of a legal or equitable mortgage upon immovable property or of a charge upon immovable property or of any bona fide transaction of money-lending upon such mortgage or charge.
- (2) The exemption provided for in this section shall apply whether the transactions referred to are effected by a money-lender or not.”

Upon this section two points were taken:—

- (a) The original loan of Shs. 1,000,000/- was advanced in eight different instalments of varying amounts the first being on December 1, 1955 and the last on February 24, 1956, and of these eight instalments six were made well before the execution of the Charge. It was therefore argued that these advances must be treated as a series of independent and isolated transactions which did not fall within the exempting words of s. 3(1)(b).

The respondents on the other hand argued that on the facts these series of advances must be regarded all as part of one transaction, which from start to finish contemplated that all such advances should be secured on the immovable property charged by the Charge.

- (b) That alternatively s. 3(1)(b) applied only where the whole or sole security was that falling within s. 3(1)(b) i.e. a mortgage or charge on immovable property and as admittedly in the present case additional security was provided by the existence of seven guarantors and by a charge on certain shares in the respondents, the section did not exempt the transaction from the provisions of the Money-Lenders Ordinance.

Secondly while it was conceded that the seal of the respondents was properly affixed in accordance with art. 114 of the Articles of Association of the respondents in the presence of two directors and the secretary of the respondents but it was argued that to constitute a valid mortgage this was not sufficient and that the seal should have been affixed in the presence of two additional independent witnesses.

Their lordships should add that some additional point was mentioned though hardly argued before their lordships that the guarantors were not bound by the Charge for they gave no consideration. Their lordships do not understand this point which seems to be entirely without substance.

With regard to point (a) of the first issue namely whether each advance was a separate and isolated transaction or was all part of one transaction which contemplated that all advances should be secured upon the immovable property charged by the charge, their lordships propose to deal with this matter very shortly. It is a question of fact and both the Acting Chief Justice and the Court of Appeal reached the clear conclusion that each advance was part of one overall transaction. Although their lordships do not normally disturb concurrent findings of fact, their lordships permitted counsel for the appellants to open the

relevant facts and they have no doubt that both courts below reached the right conclusion. They would not wish to add anything to the very clear and detailed findings on this point of Gould, V.P., who delivered the leading judgment in the Court of Appeal.

Their lordships turn then to point (b), namely the true construction to be placed upon s. 3(1)(b), and in particular the precise meaning to be placed upon the two words “the security” in the opening part of the sub-paragraph. But before proceeding to a detailed consideration of this matter their lordships would point out that the paragraph of the sub-section itself shows signs of slovenly drafting in relation to the later phrase “or of any bona fide transaction of money-lending”. This was considered in *S. N. Shah v. C. M. Patel and Others* (1), where the President in effect omitted the word “of”. However the true construction of that phrase does not arise in this case for it is clearly with the earlier words of the sub-paragraph that their lordships are concerned.

The true construction of the section is by no means easy, “the security” is ambiguous both in sub-para. (a) and in sub-para. (b). A possible meaning grammatically is “the sole security”, but this would lead to the result that if there was only one security for repayment of the loan which fell either within sub-para. (a) or sub-para. (b) the transaction would be exempt from the provisions of the Ordinance, but if the money-lender took two securities one which fell within sub-para. (a) and the other within sub-para. (b) the transaction would not be exempt and Parliament cannot have intended that.

The possible alternative ways of construing the section are either to read “the” as “a” or to omit “the” altogether.

In these circumstances, in the case of *S. N. Shah v. C. M. Patel and Others* (1) the Court of Appeal examined the policy behind the Ordinance and the mischief at which it was aimed, to assist in reaching a conclusion upon the construction of the section.

Gould, J.A., said ([1961] E.A. at p. 409):

“That being so it is necessary to come to a conclusion as to the meaning of the words ‘the security’ in s. 3(1)(b). I do not think that the use of the definite article necessarily favours Mr. Mandavia’s argument for the purpose of which he must insert, as he did in argument, the word ‘only’. On the other hand, a construction which would permit the operation of the section where the mortgage or charge was not the only security, would also necessitate reading the word ‘the’ as ‘a’, or some similar modification. Either construction appears to be open on the existing wording and I think that it must be resolved by a consideration of the intention of the legislature so far as it can be gathered from the section as a whole.

The first of the two exemptions from the operation of the Ordinance which the section creates is that contained in para. (1)(a) thereof, relating to transactions where the security is upon chattels and the interest does not exceed nine per cent. per annum. Sub-section (2) makes it clear that both exemptions apply whether the lender is a money-lender or not. I think that it is a legitimate deduction (and not pure speculation) from the nature of the two exemptions that the legislature considered that borrowers who could put up these types of security were more likely to be men of some substance not requiring to the fullest extent in the case of chattel owners, or at all in the case of owners of immovables, the protection of this type of legislation. They would be less subject to extortionate practices as, offering securities of this nature, they could expect to find lenders outside the ranks of professional money-lenders, willing to lend at reasonable rates of interest.

It is, I think, advantageous to envisage a money-lending transaction secured both upon immovable property and chattels. If the interest rate were twelve per cent. per annum, there would appear at first glance to be conflict in that the transaction would be outside the scope of the Ordinance by virtue of s. 3(1)(b) but within it by virtue of s. 3(1)(a). If, however, the legislature considered that a borrower who could put up immovables as security needed no protection, the conflict is more apparent than real, for he could not be more in need of protection because he was able to put up both forms of security. On the other hand, if the interest rate on such a loan were six per cent. per annum then a strict application of the construction urged by Mr. Mandavia would defeat the object of the section completely. If each of the paras. (a) and (b) is to be read as referring to the 'only' security, the inclusion of any other security in either case, would negative the exemption.

With these considerations in mind I conceive the position to be shortly this: that the words of the section allow of two alternative constructions; that the legislature plainly did not consider that a borrower offering immovables as security required the protection of the Ordinance; and that there can be no possible reason for imputing to the legislature a desire to bring such a borrower back within the protection of the Ordinance merely because he is able to provide other security in addition to the immovables. I would therefore hold that where, as in the present case, a money-lending transaction is secured by a mortgage or charge of immovable property, it is taken out of the scope of the Ordinance, whether or not security other than the immovable property has also been provided. For these reasons I agree that Mr. Mandavia's contentions fail and s. 3(1)(b) applies."

The same court adopted the reasons given by Gould, J.A., just quoted, when considering a similar section in the Money-Lenders Ordinance of Uganda, see *Buganda Timber Co. Ltd. v. Mulji Kanji Mehta* (2).

Their lordships entirely agree with the reasoning of Gould, J.A., and with his conclusion. The Money-Lenders Ordinance is designed to protect the public from money-lenders but it seems reasonably clear that Parliament thought that a borrower would require no such protection if the security was of a chattel interest and interest was limited to nine per cent. per annum or without such limitation of interest if the security was upon immovable property; no doubt because in such a case the borrower would almost invariably be advised by his solicitor and the exact terms of repayment would be apparent on the face of the mortgage or charge.

In the result their lordships are of opinion that "the security" should be read as "a security", a variation which in a poorly drawn section does not do great violence to the language used. So this point of defence fails.

In the present case the charge on the immovable property was the predominant part of the security. No question arises as to whether the exemption under s. 3(1)(b) of the Ordinance could be obtained by the creation of an insignificant or relatively unimportant charge on immovable property.

With regard to the second main issue there was much controversy in the Court of first instance and for some days in the Court of Appeal as to whether the land charged was subject to the Land Titles Ordinance or to the Registration of Titles Ordinance, but the appellants finally conceded that the land was subject to the operation of the latter Ordinance.

Reference to some sections of this Ordinance must now be made.

Section 1(2) provides:

“Except so far as is expressly enacted to the contrary no Ordinance in so far as it is inconsistent with this Ordinance shall apply or be deemed to apply to land whether freehold or leasehold which is under the operation of this Ordinance.”

Section 58 provides for the attestation of every signature to an instrument requiring to be registered. Briefly, sub-s. (1) provides for attestation by *one* witness holding certain qualifications, but sub-s. (3) provides:

“The provisions of this section shall not apply to any instrument executed by the Governor, or any duly registered company by means of its common seal affixed in accordance with the memorandum and articles of association.”

It is not in dispute that the Charge has been executed in accordance with the provisions of s. 58 and if no more is required the Charge is a valid registered charge. The appellants contend, however, that to render the document a valid mortgage, further attestation was required by two witnesses under and by virtue of s. 59 of the Indian Transfer of Property Act 1882 which is applicable to Kenya.

The first paragraph of s. 59 of the Transfer of Property Act is in these terms:

“Where the principal money secured is one hundred rupees or upwards, a mortgage can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses.”

Counsel for the respondents conceded that the signatures of the directors and secretary do not satisfy s. 59 as their signatures are part of the act of execution by the Company and not as witnesses, see *Deffell v. White* (3).

While the terms “mortgage” and “charge” are synonymous for nearly all purposes in English law this is not so under the Transfer of Property Act.

Counsel for the appellants conceded that if the charge is a “charge” and not a “mortgage” then s. 59 has no application and his point fails. While their Lordships think there is something to be said for the view that this is a charge and not a mortgage no point has been taken upon it in the Courts below and their Lordships will assume, rightly or wrongly, that the Charge is a simple mortgage as defined in the Transfer of Property Act.

It also appears from the judgment of Rudd, Ag. C.J., that he doubted whether s. 59 applied at all where the mortgage was executed by a company and not by an individual on behalf of a company, and those doubts may be well founded, but no point has been taken thereon, and again their Lordships are prepared to assume that it does so apply.

The question is of the shortest; does the assumed requirements of s. 59 that to create a valid mortgage there must be two attesting witnesses, apply to documents to be registered under the Registration of Titles Ordinance?

The appellants argue that this requirement is merely an additional requirement and not one which is “inconsistent” for the purposes of s. 1(2) of the Registration of Titles Ordinance.

Both Rudd, Ag. C.J., and the Court of Appeal overruled the appellants’ contention. The Acting Chief Justice held that s. 58 of the Registration of Titles Ordinance overrode s. 59 of the Transfer of Property Act and Gould, V.-P., in the Court of Appeal thought it was abundantly clear that s. 58 provided a complete code in relation to attestation of instruments requiring to be registered under the Ordinance.

Their Lordships entirely agree with both expressions of opinion. Section 1(2) of the Ordinance made

it plain that the Ordinance is really a code for the relevant

purpose. The Registrar charged with the administration of the Registry would have an impossible task if he had to satisfy himself that a document submitted for registration had, in relation to its execution, to comply not merely with the provisions of the Ordinance but with the requirements of some other Act or Ordinance. Further it seems to their lordships that the requirement of s. 59 is inconsistent with the requirements of s. 58, for s. 58 states by necessary implication that no attesting witness is required if executed by a company in accordance with its Articles while s. 59 says two witnesses are required. Accordingly s. 58 overrides s. 59 by virtue of s. 1(2).

This defence also fails. In the result the appeal fails and is dismissed with costs. The respondents may have liberty to add their costs of this appeal and of the costs awarded to them in the Courts below to their security.

Appeal dismissed.

For the appellants:

Goodman, Derrick & Co., London

J. T. Molony, Q.C., Muir Hunter, Q.C. and E. C. Evans-Lombe

For the respondent:

Coward, Chance & Co., London

R. J. Parker, Q.C., J. M. Nazareth, Q.C. and R. C. Southwell

Andrew Sosiah Tandia and others v Republic [1966] 1 EA 160 (CAN)

Division:	Court of Appeal at Nairobi
Date of ruling:	3 May 1966
Case Number:	30/1966
Before:	Duffus Ag VP, Spry and Law JJA
Sourced by:	LawAfrica
Appeal from:	The High Court of Kenya – Farrell, J.

[1] *Criminal law – Appeal – Court of Appeal – Appeal against sentence only – Jurisdiction – Conviction by magistrate – Accused committed to High Court for sentence – Sentence of ten years aggregate passed by High Court – Magistrate empowered to pass sentence which was passed by High Court – Appeal to Court of Appeal – Whether jurisdiction to hear appeal – Criminal Procedure Code (Cap. 27) s. 221(2)(b), (K.).*

Editor's Summary

The three appellants were charged with five counts of robbery with violence and the magistrate convicted the first appellant on counts 1 and 4; the second appellant on counts 2 and 3; and the third appellant on counts 3, 4 and 5. The magistrate acting under the provisions of s. 24 of the Penal Code committed the appellants to the High Court for sentence and the High Court sentenced each appellant to five years' imprisonment and ten strokes on each count except that no corporal punishment was ordered on count 5. The judge further ordered that the sentences should run consecutively except in the case of the third appellant he ordered that the sentence on counts 3 and 4 should be consecutive and that on count 5 should be concurrent with the sentence on count 4. On appeal to the Court of Appeal it was submitted for the respondent that the Court had no jurisdiction to hear the appeal as under the provisions of s. 221(2)(b) of the Criminal Procedure Code, the appeal lay to the High Court. In support of this submission it was pointed out that the sentences passed by the High Court could have been lawfully passed by the magistrate as he was empowered to do under s. 7 of the Criminal Procedure Code.

Held –

- (i) the intention of s. 221(2)(b) is to preserve the right of appeal to the High Court in cases in which the sentence passed by the judge of the High Court would be a sentence which the subordinate court had power to pass, and the right to appeal to the Court of Appeal would only arise when the sentence passed was one which could not have been passed by the subordinate court;
- (ii) as the magistrate had power to pass the sentences which the High Court passed, the right of appeal under s. 221(2)(b) of the Criminal Procedure Code lay to the High Court and not to the Court of Appeal.

Appeal dismissed.

Case referred to in judgment:

(1) *Ndirango s/o Njuma v. R.* (1953), 20 E.A.C.A. 190.

Judgment

Duffus Ag VP, read the following judgment of the Court: The three appellants were convicted by a Resident Magistrate, Mr. R. K. Mitra, on various charges of robbery with violence contrary to s. 296(2) of the Penal Code, and acting under the provisions of s. 221 of the Criminal Procedure Code, the Magistrate committed the appellants to the High Court for sentence. The appellants were then duly brought before a judge of the High Court and sentenced. The appellants had been jointly tried on charges contained in five counts, each count was in respect of a different robbery and against only some of the appellants. In the result the first appellant was found guilty on counts 1 and 4; the second appellant guilty on counts 2 and 3; and the third appellant on counts 3, 4 and 5.

The learned judge sentenced each appellant to five years' imprisonment and ten strokes on each count except that no corporal punishment was ordered on count 5. He ordered that the sentences should run consecutively except in the case of the third appellant who had been convicted on three counts, and the order in his case was that the sentences on counts 3 and 4 should be consecutive and that on count 5 should be concurrent with the sentence on count 4.

The cumulative effect, therefore, of the sentence on each appellant would be ten years' imprisonment and twenty strokes. Each of the appellants now appeals to this Court but only on sentence.

On this appeal coming before this Court, we first considered the question of our jurisdiction to hear this appeal and at our request Mr. Khaminwa, counsel for the Republic, addressed us on this point. We also heard the first appellant who appeared in person. We granted an adjournment for counsel to consider the position, and on resumption, Mr. Khaminwa submitted that this Court had no jurisdiction to hear this appeal as under the provision of s. 221(2)(b) of the Criminal Procedure Code, the appeal lay to the High Court. He referred to the fact that Mr. R. K. Mitra, the Magistrate who tried the case was by virtue of Gazette Notice No. 994 of 1963 empowered under the provisions of s. 7 of the Criminal Procedure Code to pass a sentence of imprisonment for a term not exceeding seven years.

Section 221(2)(b) provides that:

“if the High Court passes a sentence which the subordinate court would not have had power to pass, the offender may appeal against the sentence to the Court of Appeal as if he had been convicted by the High

Court, but, save as aforesaid, the offender shall have the same right of appeal in all respects as if he had been convicted and sentenced by the subordinate court.”

The Resident Magistrate would also have power by virtue of the provisions of s. 14 of the Criminal Procedure Code to have passed consecutive sentences in this case, up to a limit in the aggregate of fourteen years' imprisonment, so that in fact the sentences passed by the High Court in this case were within the powers of the subordinate court. It would therefore appear that in accordance with the provisions of sub-s. (2)(b) of s. 221 as set out above, the appeal lay to the High Court and not to this Court. It is to be noted that the learned judge of the High Court after he sentenced the appellants and when advising them of their right of appeal, specifically informed the appellants that the appeal lay to the High Court.

We would, however, refer here to the provisions of sub-s. (3) of s. 14 of the Criminal Procedure Code.

Section 14 reads as follows:

- "14(1) When a person is convicted at one trial of two or more distinct offences, the court may sentence him, for such offences, to the several punishments prescribed therefor which such court is competent to impose; such punishments when consisting of imprisonment to commence the one after the expiration of the other in such order as the court may direct, unless the court directs that such punishments shall run concurrently.
- (2) In the case of consecutive sentences, it shall be not necessary for the court, by reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent to impose on conviction of a single offence, to send the offender for trial before a higher court:

Provided that –

- (i) in no case shall such person be sentenced to imprisonment for a longer period than fourteen years;
 - (ii) if the case is tried by a subordinate court, the aggregate punishment shall not exceed twice the amount of punishment which the court is, in the exercise of its ordinary jurisdiction competent to impose.
- (3) For the purposes of appeal or confirmation, the aggregate of consecutive sentences imposed under this section in case of convictions for several offences at one trial shall be deemed to be a single sentence."

The general meaning of sub-s. (3) is clear in so far as the appeal lies from the subordinate court to the High Court; thus under the provisions of s. 348 sub-s. (2) of the Criminal Procedure Code, no appeal shall be allowed in cases in which a subordinate court has passed a sentence not exceeding one month, but by virtue of sub-s. (3) an appeal will lie if the aggregate of all the sentences given on several counts at one trial exceeds one month, even though the individual sentences on each count are less than one month. In other words, the deciding factor is the aggregate of all the sentences delivered at one trial and not the individual sentence on each count. The same principle applies in deciding whether sentences have to be confirmed as required by ss. 8, 9 and 10 of the Criminal Procedure Code. Equally, in our view, the same principle applies in so far as an appeal lies from trials at the High Court to this Court under s. 379 of the Code. That is, an appeal against sentence lies, with the leave of this Court, on a trial where the aggregate of all the sentences passed at the trial exceeds twelve months.

We have considered whether sub-s. (3) would apply to sentences passed by the High Court under s. 221 as in this case. If the aggregate of the sentences passed was to be deemed to be one sentence for the purposes of deciding where the appeal would lie, then in the case of all these three appellants their sentences would

be deemed to be one sentence of ten years' imprisonment which would then be a sentence beyond the jurisdiction of the trial magistrate, and the appeal would be to this Court.

This would not, however, appear to be the meaning or intention of s. 221(2)(b). The clear intention of this subsection is to preserve the right of appeal to the High Court in cases in which the sentence passed by the judge of the High Court, would be a sentence which the subordinate court had the power to pass, and the right to appeal to this Court would only arise when the sentence passed was one which could not have been passed by the subordinate court.

We are of the view that this is the correct interpretation and the deciding factor is simply whether the sentences passed were sentences that could have been passed by the subordinate court or were sentences beyond their powers. In this case the sentences passed on the three appellants could have been given by the Resident Magistrate and the right of appeal was therefore to the High Court.

We might here refer to the judgment of this Court in the case of *Ndirango s/o Njuma v. R.* (1). This was a similar case except that the appeal was against conviction and sentence and the Resident Magistrate's jurisdiction was limited to a sentence of three years' imprisonment or a maximum of six years for consecutive sentences and the sentence of the Supreme Court amounted to an aggregate of eleven years. In their judgment the Court said:

"It is quite clear that, in the instant case, the appeal against sentence is properly brought to this Court. The maximum sentence which the Resident Magistrate could have passed was six years, that is to say, twice the amount of punishment which he as a Subordinate Court of the first class is, in the exercise of his ordinary jurisdiction, competent to impose (Criminal Procedure Code, s. 7 and s. 13(2)(b))."

We find, therefore, that this appeal has not been properly brought to this Court. We have no jurisdiction to act in this matter, and accordingly order that the appeal be struck out.

It would appear likely that the appellants were misled whilst in prison in appealing to this Court and no doubt this is a matter that the High Court will consider if the appellants still desire to appeal and apply to the High Court for leave to appeal out of time.

Appeal dismissed.

The appellants did not appear and were not represented.

For the respondent:

The Attorney General, Kenya

J. M. Khaminwa (State Attorney, Kenya)

Total Oil Products Ltd v William M K Malu and others
[1966] 1 EA 164 (HCK)

Division: High Court of Kenya at Nairobi
Date of judgment: 27 April 1966
Case Number: 807/1965

Before: Miles J
Sourced by: LawAfrica

[1] Practice – Third party procedure – Action against four defendants as partners of a firm – Three defendants instituting third party proceedings against first – First defendant filing defence and counterclaim against three defendants – Whether third party who is already party to the suit entitled to counterclaim in third party proceedings against co-defendants – Civil Procedure (Revised) Rules, 1948, O. 1, r. 18 and r. 21 (K.).

Editor's Summary

The plaintiffs filed a suit against four defendants trading as “Kiene Service Station”. The second, third and fourth defendants then took out third party proceedings against the first defendant claiming indemnity on the ground that they had withdrawn from the partnership at the relevant time and also that the debt was incurred by the first defendant without their authority. The first defendant filed a third party defence denying the allegations made by the second, third and fourth defendants, and counterclaimed for Shs. 1,000/- in respect of money paid by him in discharge of debts owed by the partnership to the plaintiff. The second, third and fourth defendants then applied to strike out the counterclaim contending that the third party procedure in Kenya is confined only to the issue of indemnity or contribution to be made by the third party.

Held – the third party procedure in Kenya is narrower in scope than in England and the only question which can be tried in such proceedings is “as to the liability of the third party to make contribution or indemnity claimed in whole or in part”, and any claim arising by way of set – off or counterclaim is excluded.

Application allowed.

Cases referred to in judgment:

- (1) *Barclays Bank v. Tom*, [1923] 1 K.B. 221.
- (2) *McCheane v. Gyles*, [1902] 1 Ch. 287.

Judgement

Miles J: This application raises a point of some importance with regard to third party proceedings upon which there is, so far as I know, no authority in Kenya. The plaintiffs claim the sum of Shs. 12,511/15 against the four defendants trading as “Kiene Service Station”. The second, third and fourth defendants who are the applicants, on this summons, instituted third party proceedings against the first defendant claiming indemnity on the ground that they had withdrawn from the partnership at the relevant time and also that the debt was incurred by the first defendant without their authority.

The matter came before Harris, J., for directions on February 23, 1966, and he ordered the second, third and fourth defendants to deliver a personal statement of their claim within 10 days and the first defendant to plead thereto within 21 days thereafter. He further directed “the issue of liability” as between the four defendants to be tried immediately after the hearing of the suit.

In pursuance of the order the second and third defendants delivered their statements of claim and the first defendant filed his defence. After denying the alleged withdrawal from the partnership by the other defendants the defence

in para. 4 goes on to claim Shs. 1,000/- from the second, third and fourth defendants in respect of money paid by him in discharge of debts owed by the partnership to the plaintiff, and there is a counterclaim for this sum. The second, third and fourth defendants now apply to strike out this paragraph and the counterclaim under O. VI, r. 17 of the Civil Procedure (Revised) Rules 1948.

It is contended by counsel for the applicants that the third party procedure is confined to the issue of indemnity and that the order of Harris, J. was made on this basis. Further pleadings, he says, would be necessary if this counterclaim were to be admitted.

Counsel for the first defendant has drawn attention to the decision of the Court of Appeal in England in *Barclays Bank v. Tom* (1), where it was held that a person who has been served by a defendant with a third party notice is entitled to counterclaim against the defendant. Scrutton, L.J., said ([1923] 1 K.B. at pp. 224, 225):

“When it has been ascertained that the defendant is liable to the plaintiff the next step is to try, in such manner as the judge may direct, the question between the defendant and the third party. The defendant says, ‘You owe me so much by way of contribution or indemnity’. How may the third party defend himself? Of course he may deny that he is under any such liability at all. But he may admit this liability and say that he has a cross-claim against the defendant which prevents any effective judgment being given against him. He may say ‘Your right to contribution will result in £100 being due from me to you, but I have a set-off in another matter in respect of which £100 will be due from you to me’. Or again he may, while admitting his liability to contribution, say that he has a claim against the defendant which cannot be made the subject of a set-off but will result in the defendant having to pay him so many pounds. It seems to me that the proper view to take on this part of the third party procedure is that taken by Cozens-Hardy, L.J., in *McCheane v. Gyles* (2) – namely, that ‘The Act treats the third party procedure as analogous to a cause instituted by the defendant as plaintiff against the third party’, with the consequence that the defendant may defend himself in any way in which any defendant in an action at the suit of a plaintiff may defend himself, among which modes of defence is indicated the making of a counterclaim.”

I would observe that in the instant case the third party (first defendant) denies his liability, but for this purpose I do not think that this makes any difference.

In the course of argument reference was made to s. 24 (3) of the Judicature Act, 1873, which provides that

“Every person served with any such notice [that is a third party notice] shall thenceforth be deemed a party to such cause or matter with the same rights in respect of his defence against such claim, as if he had been sued in the ordinary way by such defendant.”

Although no express mention is made of this subsection in the judgments it is clear from the observations of Scrutton, L.J., that he must have had it in mind and that it was in effect the ratio decidendi in that case.

In the Kenya Rules third party procedure is dealt with in O. I, rr. 14 et seq. Rule 18 provides:

“If a third party enters an appearance pursuant to the third party notice, the defendant giving the notice may apply to the Court by summons in chambers for directions, and the Court upon the hearing of such application, may, if satisfied that that is a proper question to be tried as to the liability of the third party to make the contribution or indemnity claimed, in whole

or in part, order the question of such liability, as between the third party and the defendant giving the notice, to be tried in such manner, at or after the trial of the suit, as the Court may direct, and, if not so satisfied, may order such judgment as the nature of the case may require to be entered in favour of the defendant giving the notice against the third party.”

Rule 21 applies the same procedure, where one defendant claims contribution or indemnity against a co-defendant. This is the case here.

It would seem that in Kenya third party procedure is narrower in scope than in England. The only question to be tried in such proceedings is “as to the liability of the third party to make the contribution or indemnity claimed, in whole or in part”, any claim arising by way of set-off or counterclaim being excluded. There is no provision in Order I on the lines of s. 24 (3) of the Judicature Act, 1873, as there was subsequently in England by O. 16A, r. 3, and presumably the omission is deliberate. This may be unfortunate since it means that a third party who wishes to raise a set-off or counterclaim can only do so by instituting a separate suit. As I see it, however, a third party is not in Kenya, as he is in England, equated for all purposes with a defendant in an ordinary suit.

It is to be noted that in the hearing of the summons for directions counsel for the first defendant did not mention that he intended to raise a set-off or counterclaim. Had he done so, and had Harris, J., held this to be permissible, a further pleading by way of reply on behalf of the second and third defendants would no doubt have been ordered.

In these circumstances I am constrained to hold that para. 4 of the defence and the counterclaim of the third party constitute an abuse of the process of the Court and they are accordingly struck out. The applicants will have the costs of this application in any event.

Application allowed.

For the second, third and fourth defendants/applicants:

R. K. D. Shah, Nairobi

For the third party/first defendant:

V. M. Patel, Nairobi

Yusufu Maumba v Republic
[1966] 1 EA 167 (CAD)

Division:	Court of Appeal at Dar-es-Salaam
Date of judgment:	30 April 1966
Case Number:	53/1966
Before:	Duffus Ag VP, Spry and Law JJA
Sourced by:	LawAfrica
Appeal from:	The High Court of Tanzania – Mustafa, J.

[1] Criminal law – Practice – Charge – Amendment – Plea of guilty – Conviction – Sentence deferred – Charge amended by magistrate after conviction – Amended charge under different section of Penal Code – Accused convicted of amended charge and sentenced – Whether magistrate empowered to amend charge after conviction – Criminal Procedure Code (Cap. 20), s. 209 (T.).

Editor's Summary

The appellant was charged on six counts of stealing by a servant contrary to ss. 271 and 265 of the Penal Code, he being a person employed in the East African Railways and Harbours Administration. The appellant pleaded guilty to five of the counts and the magistrate accordingly convicted him on those five counts but deferred sentence until after the trial of the sixth count. Subsequently the prosecution withdrew the sixth count and then sought to amend the charge by substituting s. 270 for s. 271. The magistrate by virtue of s. 209 of the Criminal Procedure Code which empowers the court to amend the charge "at any stage of the trial" allowed the amendment. However the charge was not in fact amended in the manner required by s. 209 and there was some irregularity in putting the amended charge to the appellant and seeing that he understood the significance of the amendment. The magistrate then convicted the appellant of the amended charge and sentenced him under the provisions of the Minimum Sentences Act 1963 to imprisonment with corporal punishment. The appellant appealed to the High Court but the appeal was dismissed. On further appeal,

Held –

- (i) the magistrate had no power to quash the first conviction and the appellant could not be re-charged with or convicted of what was substantially the same offence; the proceedings subsequent to the first conviction were without jurisdiction and were a nullity;
- (ii) s. 209 of the Criminal Procedure Code allows amendment of a charge that is defective, either in substance or form and as there was nothing defective in the charge s. 209 was not relevant;
- (iii) the magistrate had no power to amend the charge after the first conviction as he was *functus officio*.

Appeal allowed in part. Second conviction quashed and sentence set aside.

Case referred to in judgment:

- (1) *R. v. Guest*, [1964] 3 All E.R. 385.

Judgment

Spry JA, read the following judgment of the court: The appellant was charged on six counts of stealing by a servant, contrary to ss. 271 and 265 of the Penal Code (Cap. 16), he being a person employed by East African Railways and Harbours. He pleaded guilty to five of the counts. The facts on which those counts were based were then given to the Court by the prosecutor and were admitted by the appellant. The trial magistrate convicted the appellant on those five counts but deferred sentence until after the trial of

the other count. This was, however, then withdrawn by the prosecutor. At that stage, the prosecutor applied for amendment of the charge by substituting a reference to s. 270 of the Penal Code for the reference to s. 271. The record then continues:

“Charge amended and put to the accused.

Accused says ‘I am guilty’.

Entered as guilty.

I convict him as charged.”

The trial magistrate heard a statement that the appellant had no previous conviction and made a finding that his age was twenty-six. After stating that “This is an offence under the 1963 Minimum Sentences Act”, he then passed the following sentence:

“I sentence the accused to the statutory minimum of 2 years’ imprisonment and 24 strokes of corporal punishment, on each count. The sentences to run concurrently.”

He also made an order for payment of compensation.

The appellant appealed to the High Court, where his appeal against conviction was dismissed. The form of the sentence was corrected but it was not substantially varied. The appellant later applied to a judge of the High Court, sitting as a judge of this Court, for leave to appeal out of time, which was granted. He was neither present nor represented at the hearing of the appeal.

The first point that concerned us was whether the trial magistrate had power to allow amendment of the charge after conviction. On this question, the learned judge on first appeal merely said:

“Now s. 209 of the Criminal Procedure Code states, and I quote:

‘209. (1) Where, at any stage of a trial . . .’

Learned State Attorney states that at any stage of a trial even after conviction and before sentence, the learned trial magistrate is empowered to grant permission to amend the charge, because until sentence is pronounced it is a stage in a trial, and therefore the charge was properly amended.”

With respect, we think this misses the essential point. The trial magistrate had convicted the appellant and he had no power to quash that conviction, nor did he purport to do so. While that conviction remained in force, the appellant could not be charged with or convicted of what was substantially the same offence. Therefore the proceedings which followed the first conviction were without jurisdiction and are a nullity. We are strengthened in our opinion by the case of *R. v. Guest* (1) which shows that in England a Court which has convicted an accused person is *functus officio*, except as regards the power to pass sentence.

In these circumstances, it is unnecessary for us to deal in detail with other questions affecting the validity of the proceedings following the first conviction, but we will briefly mention them. First, s. 209 allows the amendment of a charge that is defective, either in substance or form. It appears to us that there was nothing defective about the charge in the present case and therefore that s. 209 was not relevant. What the prosecutor really wished to do was to withdraw from the prosecution and subsequently to lodge a fresh charge, a course which at an earlier stage of the proceedings he might have taken under s. 86 of the Criminal Procedure Code with the consent of the court or on the instructions of the Director of Public Prosecutions, but of which after conviction it was

too late to avail himself. Secondly, we note that the charge was not in fact amended, in the manner required by s. 209, which provides that the alteration of a charge shall be “either by way of amendment of the charge or by the substitution or addition of a new charge”. Thirdly, there appears to have been irregularity in putting the “amended” charge to the appellant. Each count should have been put to him separately and his plea taken on it. The learned judge on first appeal remarked:

“It is likely that the appellant pleaded ‘I am guilty’ to each of the five amended counts and the magistrate by inadvertence omitted to record five separate pleas of ‘I am guilty’.”

We entertain some doubt whether that inference was justified.

The learned judge also considered whether the words “I am guilty” constituted a sufficient plea. He said that he would not normally regard these words as unequivocal. He reached the conclusion that they should be regarded as unequivocal in the present case, first, because it could be presumed that the appellant spoke in English, and, secondly, because, the facts having been put to him, and agreed by him, when he was first charged, it could not be said that he did not know to what he was pleading guilty.

With respect, we cannot agree. In the first place, we do not think there can be any presumption that an accused person spoke English at his trial, particularly where it is not his mother tongue. Still less do we see any merit in the submission of learned State Attorney in the High Court, that every station-master must be presumed to know English. In this connection, we would observe that we consider, having regard to the provisions of s. 12 of the Magistrates’ Courts Act, 1963 (No. 55 of 1963), that magistrates should invariably record the language or languages in which proceedings are conducted.

Furthermore, we think there is a fallacy in saying that because the facts were unchanged, the appellant knew to what he was pleading guilty. The amendment of the charge might well have seemed a formality to anyone other than a lawyer but so far as the appellant was concerned, it was one that involved very serious consequences. It was therefore the duty of the magistrate, before taking pleas on the amended charge, to make quite certain that the appellant understood the significance of the amendment and we are certainly not satisfied that he did so.

Learned State Attorney conceded that if the first conviction were held to be subsisting and the second conviction invalid, the Minimum Sentences Act, 1963, would not be relevant, because the words “the Government” in para. 3 of Part I of the Schedule to the Act must have the meaning given to it in the Interpretation and General Clauses Ordinance (Cap. 1), that is “the Government of the Territory” and cannot include the East African Railways and Harbours, which is one of the Common Services. In that event, he asked us to impose the appropriate sentence ourselves, rather than remit the matter to the lower court.

For the reasons we have given, we are satisfied that all the proceedings in the subordinate court subsequent to the first conviction are a nullity and that that conviction was valid and correct. We accordingly quash the purported second conviction and the sentence passed by the trial magistrate. We substitute a sentence of twelve months’ imprisonment on each of the first two counts and six months’ imprisonment on each of the third, fifth and sixth counts. The sentences on the first, second and third counts are to run concurrently, as are the sentences on the fifth and sixth counts. The actual sentence

to be served will therefore be eighteen months. To this extent, the appeal is allowed. The order for payment of compensation will stand.

Appeal allowed in part. Second conviction quashed and sentence set aside.

The appellant did not appear and was not represented.

For the respondent:

The Attorney General, Tanzania

O. T. Hamlyn and M. Makanza (Senior State Attorney, and State Attorney, Tanzania)

Bisareri Omurenji v Uganda
[1966] 1 EA 170 (CAK)

Division:	Court of Appeal at Kampala
Date of ruling:	24 June 1966
Case Number:	40/1966
Before:	Sir Clement de Lestang Ag P, Spry Ag VP and Law JA
Sourced by:	LawAfrica
Appeal from:	The High Court of Uganda – Sheridan, J

[1] Criminal Law – Murder – Acute conflict of evidence between prosecution and defence – Evidence to support both versions – Conviction based on prosecution evidence only – Failure to consider evidence for the defence – Inadmissible evidence prejudicial to appellant relied on – Whether conviction should be set aside.

Editor's Summary

The appellant was convicted of murder. There was acute conflict between the prosecution and the defence versions of the incident leading to the death of the deceased and there was evidence to support both versions. The trial judge in convicting the appellant believed the prosecution version and rejected that of the defence. The trial judge also admitted inadmissible evidence which was highly prejudicial to the appellant and his decision was influenced by such evidence. On appeal it was contended that the judge failed adequately to consider the evidence for the defence.

Held – as the admission of inadmissible evidence was highly prejudicial to the appellant and as the judge had failed adequately to consider the evidence for the defence, it was dangerous to allow the conviction of the appellant to stand.

Appeal allowed. Conviction quashed and sentence set aside.

No cases referred to in judgment.

Judgment

Sir Clement de Lestang Ag P read the following judgment of the court: The appellant was convicted of the murder of a man called Pangalasio Olara on the night of May 30, 1965. Briefly put, the case for the prosecution was that on that day the deceased together with one Obol and a Police Constable called Oganya, who was not in uniform, attended a funeral on the Buganda side of the Nile. At about 9.00 p.m. they were on their way back to Jinja when on the main Kampala/Jinja road near the Nile Brewery for members of the Uganda Rifles in civilian clothes barred their way and began to push them around. One of the riflemen was the appellant and he had a panga in his hand. He cut Obol on the right arm and then ran to where the deceased was struggling with the two other riflemen and struck him on the back of the head with the panga. The deceased fell down unconscious, seeing which Obol

snatched the panga from him and struck him with it on the back of the head as he was running away. P.C. Oganya stopped a passing car for help and at the same time the appellant came running back and both he and the deceased were put in the car and taken to the hospital. The deceased died on the following day from the injury to his head. The defence was that on the day in question the four riflemen visited a brother of the appellant called Wilson and spent the evening at his house near the Nile Brewery. After partaking of the evening meal with him, they set off to return to their barracks at about 8.00 p.m. On the way they met four men who stopped them. One of these men had a panga with which he cut the appellant on the head, the other riflemen ran away as they were unarmed.

There was thus an acute conflict between the prosecution and the defence versions of the incident and there was evidence to support both versions. The learned judge believed the prosecution version and rejected that of the defence in these words:

“The defence was that the accused and the other three soldiers were the victims of an ambush as they were returning unarmed from a visit to Wilson’s. Even if these warriors had run away through fear one would have expected them to take steps to succour their injured colleague, if only by a report that night. They are unable to account for the deceased’s injury.”

It was contended on behalf of the appellant that the learned judge failed adequately to consider the evidence for the defence. We think that this criticism is not without substance. Moreover the suggestion that no report to the police was made that night by the riflemen does not appear to be correct. There is evidence that two of the four men called at the police station of their own accord shortly after the incident and this could only have been for the purpose of reporting the incident. Be that as it may, there is another more serious criticism of the judgment. In arriving at his decision the learned judge was influenced by a statement made by one of the prosecution witnesses, to the effect that he had been told by Wilson that he had given the panga to the four riflemen as it was dark. As Wilson was not called as a witness that evidence was inadmissible; and since the party which had the panga originally must have been the attacker, that evidence was highly prejudicial to the appellant. Having regard to these unsatisfactory features we consider that it would be dangerous to allow the conviction of the appellant to stand. The appeal is allowed, the conviction quashed and the sentence set aside. The appellant will be released from custody forthwith.

Appeal allowed. Conviction quashed and sentence set aside.

For the appellant:

Wilkinson & Hunt. Kampala

P. J. Wilkinson, Q.C. and N. M. Patel

For the respondent:

The Attorney General, Uganda

A. G. Deobhakta (State Attorney, Uganda)

The British India General Insurance Co, Ltd v G M Parmar and Co
[1966] 1 EA 172 (CAN)

Division:

Court of Appeal at Nairobi

Date of ruling: 6 June 1966
Case Number: 9/1966
Before: Sir Clement de Lestang Ag P, Spry and Law JJA
Sourced by: LawAfrica
Appeal from: The High Court of Kenya – Miles, J

[1] *Practice – Pleading – Amendment – Amendment of defence before trial – Amendment resisted on ground that inconsistent with original defence – Principle that amendments generally allowed unless that would cause an injustice explained.*

Editor's Summary

In an action by the respondent to enforce a motor vehicle policy in respect of a collision between its petrol lorry and a locomotive the appellant insurer had denied liability on the ground that the policy did not cover use of the lorry for hire or reward as was alleged to be the case at the time of the accident. Subsequently an application was made to amend the defence by adding three new paragraphs, the effect of which was, in the alternative, to avoid the policy on the ground of misrepresentation and non-disclosure of material facts in the proposal form. The judge refused the amendment because, in his view, it was inconsistent with the original defence and that he was bound by the decision in *Abdul Karim Khan v. Mohamed Roshan* (1), which he understood to lay down the principle that the courts will not permit an amendment that is inconsistent with the original pleading and entirely alters the nature of the defence. On appeal,

Held –

- (i) the decision of *Abdul Karim Khan v. Mohamed Roshan* was decided on its own facts and did not change the general principle that the courts will freely allow an amendment to pleadings before the hearing if it can be done without injustice to the other side;
- (ii) the amendment sought to add a new ground for denying liability which could have been pleaded in the beginning as an alternative ground of defence and as the judge was satisfied that the application was made bona fide and could cause no injustice to the respondents there was no good reason to refuse the respondents leave to amend their defence.

Appeal and amendment allowed.

Cases referred to in judgment:

- (1) *Abdul Karim Khan v. Mohamed Roshan*, [1965] E.A. 289 (C.A.).
- (2) *Simonian v. Johar*, [1962] E.A. 336 (K.).
- (3) *Tildesley v. Harper* (1878), 10 Ch.D. 393.
- (4) *Eastern Bakery v. Castelino*, [1958] E.A. 461 (U.).
- (5) *Clough v. London & North Western Railway Co.* (1871), L.R. 7 Exch. 26.

- (6) *Kwei Tek Chao and Others v. British Traders and Shippers, Ltd. N.V. Handelsmaatschappij J. Smits Import-Export, Third Party*, [1954] 2 Q.B. 459.
- (7) *Scarf v. Jardine* (1882), 7 A.C. 345.
- (8) *Car and Universal Finance Co., Ltd. v. Caldwell*, [1964] 1 All E.R. 290.
- (9) *Clarapede v. Commercial Union Association* (1883), 32 W.R. 262.
- (10) *Budding v. Murdoch* (1875), 1 Ch.D. 42.
- (11) *Ma Shwe Mya v. Maung Po Hnaung* (1921), 48 I.A. 214; 48 Cal. 832.
- (12) *Raleigh v. Goschen*, [1898] 1 Ch. 73.

- (13) *Weldon v. Neil* (1887), 19 Q.B.D. 394.
- (14) *Hilton v. Sutton Steam Laundry*, [1946] 1 K.B. 65 (No).
- (15) *G. L. Baker, Ltd. v. Medway Building and Supplies, Ltd.*, [1958] 3 All E.R. 540.
- (16) *J. Leavey & Co., Ltd. v. George H. Hirst & Co., Ltd.*, [1943] 2 All E.R. 581.
- (17) *Jupiter General Insurance Co., Ltd. v. Rajabali Hasham and Sons*, [1960] E.A. 592 (T.).

The following judgments were read:

Judgment

Sir Clement de Lestang Ag P: This is an appeal by the British India General Insurance Co., Ltd. (hereinafter referred to as “the defendants”) against an order and ruling of the High Court of Kenya refusing them leave to amend their defence. The plaintiffs, G. M. Parmar & Co., were the owners of a petrol tanker which was insured with the defendants. On July 26, 1962, the plaintiffs’ tanker collided with a locomotive at a railway crossing. On the following day the defendants were notified of the accident and on July 30 sent a claim form to the plaintiffs which they returned duly completed to the defendants’ advocates, Geoffrey White & Co. on August 28, 1962. The claim form disclosed that the driver of the tanker had on September 16, 1957, been convicted of dangerous driving and had had his licence endorsed. That fact was not disclosed in the proposal form for the insurance in which the reply to question 14, “Have any of your drivers been fined or had their licences endorsed, etc.” was “No”. Meanwhile on August 22, 1962, the defendants’ advocates had written to the plaintiffs that at the time of the accident the tanker was being used for hire or reward, a purpose not covered by the policy of insurance, and that they accepted no liability whatsoever under the policy. On June 20, 1963, the plaintiffs brought a suit against the defendants in which they claimed a total sum of Shs. 124,014/47 under the policy. In paragraph 10 of the plaint the plaintiffs averred that “by letters before action (the defendants) have refused to be bound by the said Policy and have expressly or by conduct waived any condition precedent as to arbitration and have failed and neglected to pay the Plaintiffs” the amount claimed or any part thereof.

The defence, prepared by Geoffrey White & Co. was filed on or about August 8, 1963. The substantive defence pleaded is to be found in paragraphs 3 and 5 which allege that it was a term and/or condition of the policy that the same did not cover the use of the vehicle insured thereunder for hire or reward and that at the time of the accident the vehicle was being used for hire or reward; consequently the defendants were under no obligation to indemnify the plaintiffs. Paragraph 12 of the defence reads:

“The Defendant denies that it has ever by any letter or letters whether before action or at all refused to be bound by the said or any policy nor has the Defendant ever expressly or by conduct or at all waived any condition (whether precedent or otherwise) as to arbitration or any thing else. The Defendant is under no obligation whatsoever to pay any sum to the Plaintiffs or anyone else and save as is expressly admitted in this Defence the Defendant denies each and every allegation made by the Plaintiffs in the Plaint”.

The suit was set down for hearing on December 16 and 17, 1963, but owing either to the absence on long leave of the defendants’ advocates or their ceasing to practice there was a change of advocates on October 29, 1963, and thenceforth Mr. Shroff acted for the defendants. It became apparent to him that there was an omission in the defence; so on or about November 11, 1963, he

filed an application to amend the defence by adding three new paragraphs, the effect of which was to avoid the policy on the ground of misrepresentation and non-disclosure of a material fact, viz., the conviction of the driver and the endorsement of his licence. The application was resisted by the plaintiffs and the learned judge refused it. Against that refusal the defendants appeal and the first question in this appeal is whether the learned judge refused the application in the exercise of his discretion or as a matter of law.

Reading his ruling as a whole it seems to me plain that the learned judge did not purport to exercise a discretion but felt compelled to refuse the application because, in his view, it was inconsistent with the original defence and that he was bound by the decision of this Court in *Abdul Karim Khan v. Mohamed Roshan* (1) which he understood to lay down the principle that the courts will not permit an amendment which is inconsistent with the original pleading and entirely alters the nature of the defence. That it is so is clear from the following passages from his ruling:

“I now come to what in my view is the most weighty objection to this amendment, namely, that it introduces a new and inconsistent defence. Now there is no objection to a plaintiff putting forward inconsistent claims in the alternative in his original plaint or to a defendant raising inconsistent grounds of defence in the alternative in his original written statement. How far does this apply in the case of an amendment?”

He then refers to a passage in the judgment of Crabbe, J.A., in *Abdul Karim Khan's* case (1) which reads as follows:

“In this case no argument which I heard during the hearing of this appeal has persuaded me that the learned judge erred on any principle of law in refusing the application for the amendments. The additional facts pleaded in para. 7 were quite obvious omissions, and counsel for the plaintiff at the trial admitted that these were referred to in correspondence with the defendant. Perhaps, what is a more serious obstacle to the plaintiff was the introduction of fresh matters into his pleadings. The claims for specific performance, damages and rescission are all founded upon an express agreement. The amendment sought to be made to para. 7 and the addition of prayer (IV) were based on s. 70 of the Indian Contract Act, which only applies in the absence of any express agreement, and therefore inconsistent with the alternative claims for specific performance, damages and rescission. Surely, the court cannot allow an amendment which creates inconsistency in the pleadings.”

After pointing out that the proposed amendment would cause no injustice to the plaintiffs the learned judge says:

“It is clear, however, upon the authority of *Abdul Karim Khan v. Mohamed Roshan* (1) (*supra*) that the courts will not permit an amendment which is inconsistent with the original pleading and entirely alters the nature of the defence. This decision is binding upon me.”

He then holds that *Simonian v. Johar* (2) does not lay down the general principle that if a claim or ground of defence could be properly pleaded in the first instance it could be added at a later stage by amendment and that such a proposition was inconsistent with the decision in *Abdul Karim Khan's* case (1) and concludes his ruling with the words “For these reasons I hold that the proposed amendment is inconsistent with the original defence and the application is dismissed with costs”. At first sight the last sentence of the passage in the judgment of Crabbe, J.A., quoted earlier would appear to support the learned judge's view and it may be that the choice of words used by that learned judge was unfortunate.

Nevertheless the sentence must not be read out of its context and when the paragraph is read as a whole it becomes clear in my view that the true reason for not interfering with the learned judge's refusal of leave to amend in that case was that Crabbe, J.A., saw no good reason to interfere with the learned judge's exercise of his discretion.

With the greatest respect to the learned judge it seems to me that *Abdul Karim Khan's* case (1) was decided on its own facts; it did not purport to lay down the principle which the learned judge drew from it; it merely decided that in the circumstances of that case the court saw no good reason to interfere with the exercise of discretion of the trial judge in refusing to allow the plaintiff to amend his pleadings which the amendment created being merely one of the factors upon which the discretion was founded. It did not purport to restrict the well-known principle expressed by Bramwell, L.J., in *Tildesley v. Harper* (3), (10 Ch.D. at p. 396):

"My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting mala fide, or that, by his blunder, he had done some injury to his opponent which could not be compensated for by costs or otherwise."

That principle was applied in *Eastern Bakery v. Castelino* (4) and *Simonian v. Johar* (2) and although those two cases were not referred to in *Abdul Karim Khan's* case (1) the court in that case applied the same general rule which was stated by O'Connor, P., in the *Eastern Bakery* case (4), viz., that

"this court will not interfere with the discretion of a judge in allowing or disallowing an amendment to a pleading unless it appears that in reaching his decision he has proceeded upon wrong materials or a wrong principle."

Counsel for the plaintiffs contended that if the learned judge did not exercise his discretion then this court should do so and uphold the refusal of the amendment on the ground that the defendants have, by their defence, lapse of time and failure to inform the plaintiffs of their intention to avoid, affirmed the policy and precluded themselves from raising a defence avoiding the policy. He relied in support of his contention on the following cases: *Clough v. London & North Western Railway Co.* (5); *Kwei Tek Chao v. British Traders and Shippers, Ltd.* (6); *Scarf v. Jardine* (7); *Car and Universal Finance Co., Ltd. v. Caldwell* (8). While it is true to say that these cases deal with the question of election it is equally true that none of them deals with amendments of pleadings. Consequently they are not applicable to the present case. No case has been cited to us and I know of none where an application to amend a pleading before trial has been refused on the ground of election. I cannot envisage a refusal on such a ground except in the plainest of cases. Whether or not there was election on the part of the defendants in the present case is a matter which the plaintiffs may raise in a reply and which ought to be decided at the hearing of the case after evidence called. For that reason I refrain from expressing any opinion as to the merits or demerits of such a plea.

The principles upon which a court acts in an application to amend a pleading before trial are well settled. They are succinctly stated in *Eastern Bakery v. Castelino* (4) where O'Connor, P., said ([1958] E.A. at p. 462):

"It will be sufficient, for purposes of the present case, to say that amendments to pleadings sought before the hearing should be freely allowed, if they can be made without injustice to the other side, and that there is no injustice if the other side can be compensated by costs: *Tildesley v. Harper* (3); *Clarapede v. Commercial Union Association* (9). The court will not

refuse to allow an amendment simply because it introduces a new case: *Budding v. Murdoch* (10). But there is no power to enable one distinct cause of action to be substituted for another, nor to change by means of amendment, the subject matter of the suit: *Ma Shwe Mya v. Maung Po Hnaung* (11). The court will refuse leave to amend where the amendment would change the action into one of a substantially different character: *Raleigh v. Goschen* (12); or where the amendment would prejudice the rights of the opposite party existing at the date of the proposed amendment, e.g., by depriving him of a defence of limitation accrued since the issue of the writ: *Weldon v. Neal* (13); *Hilton v. Sutton Steam Laundry* (14). The main principle is that an amendment should not be allowed if it causes injustice to the other side: Chitale, p. 1313.”

In *Simonian's* case (2) this court approved amendments to a plaint which raised new causes of action because they were not of a different character from or foreign to or inconsistent with the original cause of action but stemmed from the same transaction. In that case Crawshaw, J.A., delivering the leading judgment with which Forbes, V.-P., and Gould, J.A., agreed, saw no reason to differ from the view expressed by the learned Chief Justice in an Indian case that if the alternative claim could be combined in the original plaint he saw no reason in principle why they could not be combined at a later stage by amendment. In *G. L. Baker, Ltd. v. Medway Building, etc., Ltd.* (15), Jenkins, L.J., after quoting the old O. 28, r. 1 of the Rules of the Supreme Court in England which corresponds with O. VI, r. 18 of the Civil Procedure (Revised) Rules, 1948, of Kenya, said ([1958] 3 All E.R. at p. 546):

“There is no doubt whatever that it is a guiding principle of cardinal importance on this question that, generally speaking, all such amendments ought to be made ‘as may be necessary for the purpose of determining the real questions in controversy between the parties’.”

The case of *J. Leavey & Co., Ltd. v. George H. Hirst & Co., Ltd.* (16), illustrates the length to which the courts in England will go to allow amendments. In that case:

“The appellants claimed damages for breach of contract to supply certain goods to which the Limitation of Supplies Order, 1941, applied, delivery as ready after June, 1941. The respondents, by their defence, set up one defence only, namely, that the Order had the effect of making it illegal, and therefore impossible, for them to fulfil their contract with the appellants. No attempt was made at the trial to support that proposition. The respondents, however, set up two new defences. First, relying upon a term in the contract ‘strikes, breakdowns, or other unforeseen circumstances excepted’, they said that unforeseen circumstances had arisen which excused them from the performance of the contract. Secondly, they maintained that, as soon as the Order came into operation, the contract was at an end by reason of the doctrine of frustration.”

The learned trial judge found in favour of the respondents on the two new defences despite the protests of the appellants and without requiring the respondents to amend their defence. On appeal the court allowed the respondents to amend their defence so as to include the two new defences but in the result found for the appellants on both issues and allowed the appeal. It will be observed that that case is the reverse of the present one. There the respondents in their original defence sought to avoid the contract and were nevertheless in the Court of Appeal allowed to amend and set up a defence affirming the contract.

Applying the principles which I have endeavoured to set out earlier in this judgment, I can see no good reason to refuse the defendants leave to amend their defence. From the beginning they denied liability and the amendment seeks to add a new ground for doing so which could have been pleaded as an alternative ground in the original defence. The learned judge was satisfied that the application was bona fide and that it could cause no injustice to the plaintiffs. It seems to me a reasonable inference to draw that had he not felt compelled by *Abdul Karim Khan's* case (1) to refuse the application he would have granted it.

I would accordingly allow the appeal, set aside the order of the learned judge, together with the order for costs, and direct that the defendants be allowed to amend their defence in accordance with the amended defence exhibited to their application, the plaintiffs being at liberty to reply thereto. I would direct that the costs of the application in the court below be left to the discretion of the trial judge at the conclusion of the case. The defendants will have the costs of this appeal. Both sides asked for a certificate for two counsel but I do not think that this is a proper case in which to make such an order.

Law JA: The background to this appeal is fully set out in the judgment of De Lestang, Ag. P. The learned judge in the High Court refused to allow the defendants to amend their written statement of defence so as to add the defence that they are entitled to avoid the policy on the ground of non-disclosure of a material fact in the proposal form which led to the issue of the policy, the original defence being that they were not liable to pay because the plaintiffs were in breach of a term or condition contained in the policy. The judge held that the proposed amendment was inconsistent with the original pleading and entirely altered the defence, and he considered that he was bound by the decision of this court in *Abdul Karim Khan v. Mohamed Roshan* (1) to refuse to allow the amendment. It is true that in that case the judgment of Crabbe, J.A., includes the phrase "Surely, the court cannot allow an amendment which creates inconsistency in the pleadings", but those words must be read in their context. The learned justice of appeal was dealing with the particular facts of the case then under consideration, and was not purporting to state a principle of general application. In *Abdul Karim Khan's* case (1) the plaintiff had been refused permission to amend his plaint by introducing a claim based on a fresh cause of action, that is to say an implied agreement, whereas the claim as originally pleaded was based on an express agreement, and this court declined to interfere with the discretion of the High Court judge in refusing to allow such an amendment. The amendment sought in the case now under consideration involves an alternative rather than an inconsistent ground of defence. It would have been open to the defendants to have pleaded:

- (a) that the policy had been avoided by reason of misrepresentation or non-disclosure of a material fact in the proposal form; and
- (b) alternatively, if the policy had not been so avoided, that the plaintiffs were in breach of a term or condition contained therein.

The failure to plead (a) in the original defence was an omission due to inadvertence on the part of the defendants' then advocates; and such an omission does not necessarily preclude the defendants from the right to have the suit decided on the proper issues; see *Jupiter General Insurance Co., Ltd. v. Rajabali Hasham and Sons* (17). In my view the defendants' application to amend their defence in this case should have been granted, and I think it would have been granted had the learned judge not considered himself to be bound by the

decision in *Abdul Karim Khan's* case (1). For these reasons, I agree that the appeal should be allowed, and I concur in the order proposed by De Lestang, Ag. P.

Spry Ag VP: I agree.

Appeal and amendment allowed.

For the appellants:

Hoshang Shroff, Nairobi

J. M. Nazareth, Q.C., and *Hoshang Shroff*

For the respondents:

G. S. Sandhu & Co., Nairobi

D. N. Khanna and *G. S. Sandhu*

Lakhamshi Bros, Ltd v R Raja & Sons
[1966] 1 EA 178 (CAN)

Division:	Court of Appeal at Nairobi
Date of ruling:	27 May 1966
Case Number:	6/1966
Before:	Duffus Ag VP, Spry and Law JJA
Sourced by:	LawAfrica
Appeal from:	The High Court of Kenya – Miles, J

[1] *Sale of goods – Goods delivered and paid for – Goods seized by police alleged to have been stolen – Magistrate's order to deliver goods to owner – Refund of price refused by vendor – Action for price of goods and damages – Breach of condition that vendor had right to sell goods – Whether breach of warranty to enjoy quiet possession of goods – Sale of Goods Act (Cap. 31) s. 14 (K.).*

[2] *Appeal – Practice – Memorandum of appeal confused by narrative and argument – Appellant deprived of costs – Eastern African Court of Appeal Rules, 1954, r. 62 (1).*

Editor's Summary

The appellant company purchased from the respondents 44 cases of boot polish, of which they resold 12. The remaining 32 cases were seized by the police, who suspected that they were stolen property, under the powers conferred by s. 20 of the Police Act (Cap. 84). The police then duly obtained an order of a magistrate, under s. 121 (3) of the Criminal Procedure Code (Cap. 75), that the goods be delivered to the true owner. The respondents refused to refund the purchase price and the appellant then sued for the

price of the goods and damages either for breach of the condition implied in the contract of sale by s. 14 (a) of the Sale of Goods Act (Cap. 31) that the respondents had the right to sell the goods or in the alternative for breach of the warranty implied by para. (b) of that section that the appellant company should have and enjoy quiet possession of the goods. The trial judge held that the appellant had failed to prove a breach of the implied condition as to title, because on the pleadings, the appellant had based its case upon theft and had failed to prove the same. Further, the trial judge rejected the allegation that there had been a breach of the warranty for quiet enjoyment, on the ground that the appellant had failed to prove that its possession of the goods had been disturbed by the respondents or anyone claiming under a superior title. On appeal,

Held –

- (i) the appellant having in its pleadings alleged theft of the boot polish and having failed to prove it, could not succeed on a claim based on breach of the implied condition as to title;
- (ii) the respondents had at least some doubt as to their title to the goods prior to the sale to the appellant so that the seizure by the police could not

be relied on by the respondent as novus actus tertii, there being a sufficient link between the seizure and the sale;

- (iii) the seizure and disposal of the goods by the police under s. 20 of the Police Act and by the magistrate under s. 121 of the Criminal Procedure Code, which were strictly complied with, were lawful as well as protected acts;
- (iv) proof that the appellant's possession had been disturbed by the police together with evidence of the respondents' knowledge that their title was liable to challenge established prima facie a breach of warranty for quiet possession of the goods which the respondents had failed to rebut;
- (v) the respondents' motion to dismiss the appeal because the memorandum of appeal was prolix, containing narrative and argument failed but the appellant would be deprived of the costs of the motion and the cost of drawing the memorandum.

Appeal allowed.

Cases referred to in judgment:

- (1) *Ali Kassam Virani, Ltd. v. The United Africa Co. (Tanganyika), Ltd.*, [1958] E.A. 204 (C.A.).
- (2) *Niblett, Ltd. v. Confectioners' Materials Co., Ltd.*, [1921] 3 K.B. 387.

The following judgments were read:

Judgment

Spry JA: The appellant company purchased from the respondents 44 cases of boot polish, of which they resold 12. The remaining 32 cases were seized by the police, who suspected that they were stolen property, under the power conferred by s. 20 of the Police Act (Cap. 84). The police duly obtained an order of a magistrate under s. 121 of the Criminal Procedure Code (Cap.75) for the detention of the 32 cases and later an order was made under sub-s. (3) of that section for their delivery to a company known as Reckitt, Coleman and Chiswick (E.A.), Ltd., which was believed to be the true owner of the goods. The appellant company then sought to recover the price of the goods and damages from the respondents either for breach of the condition implied in the contract of sale by s. 14 (a) of the Sale of Goods Act (Cap. 31) that the respondents had the right to sell the goods or in the alternative for breach of the warranty implied by para. (b) of that section that the appellant company should have and enjoy quiet possession of the goods.

The plaint as originally filed did not contain any allegation that the goods had been stolen but did contain a statement that they had been seized by the police "on the ground that the said Boot Polish were stolen property of Reckitt Coleman & Chiswick (E.A.), Limited". At the first hearing of the suit counsel for the respondents, appears to have taken (inter alia) the preliminary point that the plaint had to include a positive allegation that the goods were stolen, and Templeton, J., upheld this submission, gave leave to amend and awarded all costs to date to the respondents. I think, with respect, that that ruling was almost certainly incorrect but there has been no appeal from it. The plaint was then amended to include an allegation that the goods were stolen property of Reckitt, Coleman & Chiswick (E.A.), Ltd.

The matter next came before the court on a notice of motion seeking further and better particulars of

the new paragraph that had been inserted in the amended plaint. It may be noted that, in ordering further and better particulars, Connell, J., remarked:

“The argument of counsel for the defendants [respondents] was really to the effect that the plaintiffs could not succeed in their suit unless they

established that the goods had been stolen. I do not consider that that consequence necessarily follows.”

He went on to say:

“The application was in my view rightly taken out and I consider the plaintiff is entitled to taxed costs of the motion in any event and I so order.”

It would appear that the learned judge intended to award the costs of the motion to the respondents. The further particulars supplied pursuant to the order were to the effect that the goods had been stolen from Reckitt, Coleman & Chiswick (E.A.), Ltd. in Kampala, Uganda, on the night of September 30/ October 1, 1961, by two Asians whose names and present whereabouts were unknown.

The trial was resumed before Miles, J., on July 14, 1965, when issues were agreed as follows:

- “(1) Was there a sale of the boot polish by the Defendants to the Plaintiffs?
- (2) Were the Defendants in breach
 - (a) of the implied condition under s. 14 (a) of the Sale of Goods Act (Cap. 31);
 - (b) of the implied warranty under s. 14 (b) thereof;
 - (c) of the implied warranty under s. 14 (c);
- (3) (a) Are the Plaintiffs entitled to the repayment of the purchase price or any portion thereof?
(b) are the Plaintiffs entitled to loss of profit and if so in what sum?
- (4) Are the Plaintiffs entitled to any other and if so what relief?”

As regards the first ground, the respondents had in their defence denied that they had ever sold any goods to, or received the price of any goods from, the appellant company but they withdrew this denial during the course of the trial. I shall have occasion to refer to this later. The reference to s. 14 (c) may be ignored: it had been raised in the plaint but was abandoned at an early stage. It may be noted that no issue was framed as to whether or not the goods had been stolen.

When he came to pass judgment, Miles, J., held that on the pleadings, the appellant company had based its case upon theft and had failed to prove theft. He distinguished the present case from *Ali K. Virani v. The United Africa Co. (Tanganyika), Ltd.* (1), to which I shall return later. He therefore held that the appellant company had failed to prove a breach of the implied condition as to title. The learned judge also rejected the allegation that there had been a breach of the warranty for quiet enjoyment, apparently on the ground that the appellant company had failed to prove that its possession of the goods had been disturbed by the respondents or anyone claiming under a superior title. Against that decision the appellant company now appeals.

Before hearing the appeal, we heard a notice of motion brought by counsel on behalf of the respondents, applying that the appeal be dismissed on the ground that it was so full of narrative and argument as to be confusing and unintelligible. While we agreed with counsel for the respondents that the memorandum failed to comply with r. 62 of the rules of this court and contained a great deal of matter which ought to have been omitted, we felt that the grounds of appeal emerged reasonably clearly and we dismissed the application reserving the question of costs.

The argument before us ranged over a wide field but the main submissions can be grouped under the two questions, first, whether there had been a breach

of the implied condition as to title and, secondly, whether there had been a breach of the implied warranty for quiet possession.

As regards the first of these questions, counsel for the appellant company, submitted that the learned judge had been in error both in holding that the basis of the plaint was the allegation that the goods were stolen, and in holding that the evidence was insufficient to prove theft. Counsel for the respondents submitted that the learned judge had not construed the plaint unduly narrowly; he argued that the entire basis of the claim was the theft as alleged in the plaint and the further particulars which, for this purpose, must be read with it. On the question whether there was a theft, counsel for the respondents submitted that there was evidence on which the learned judge could arrive at his finding and on a matter of fact it would not be right for this court to interfere.

On the first of the submissions of counsel for the appellant, I am inclined, so far as the question of the implied condition as to title is concerned, to think that the appellant company was bound by its pleadings and particulars. If the evidence took an unexpected course, it was open to counsel to apply for amendment but no such application was made. On the other submission, I do not propose to set out the evidence in detail. It was certainly unsatisfactory; the witnesses appear to have had little personal knowledge of the facts to which they were testifying and ambiguous and contradictory statements were not clarified in examination. While I might not have arrived at the same conclusion, I am not prepared to say that the learned judge was wrong. I would, therefore, reject this ground of appeal.

The question whether there was a breach of the implied warranty for quiet possession presents more difficulty. The relevant part of s. 14 of the Sale of Goods Act reads as follows:

- “14. In a contract of sale, unless the circumstances of the contract are such as to show a different intention, there is –
- (a) . . .
 - (b) an implied warranty that the buyer shall have and enjoy quiet possession of the goods; . . .”

Counsel for the appellant submitted that this implied warranty was broken if the buyer’s possession of the goods was disturbed by any lawful act of a third party. He relied for this proposition on the decision of this court in the *Ali K. Virani* case (1) and on the English case of *Niblett v. Confectioners’ Materials Co., Ltd.* (2). In the latter case, Atkin, L.J., observed ([1921] 3 K.B. at p. 403):

“Probably this warranty resembles the covenant for quiet enjoyment of real property by a vendor who conveys as beneficial owner in being subject to certain limitations, and only purports to protect the purchaser against lawful acts of third persons and against breaches of the contract of sale and tortious acts of the vendor himself.”

That statement was accepted by this court in *Ali K. Virani’s* case (1), which was also a case where goods were seized by the police as suspected of having been stolen and where the theft had not been proved. In that case it was said ([1958] E.A. at p. 211) that a

“claim under s. 14 (b) would still not necessarily be barred, even if the claim of superior right was false and the conviction was wrong, for the action of the police was lawful, even if based on incorrect information.”

Counsel for the appellants argued that that principle applied exactly to the present case, where the action of the police and the magistrate in relation to

the seizure and disposal of the goods was lawful. Counsel for the respondents submitted that there was no implied warranty by a seller that the buyer's possession would not be disturbed by the police or a magistrate acting on wrong information. So far I would agree with him: I think, with respect, that counsel for the appellant put his proposition too widely, and that there must be a link between the action of the police and the sale by the vendor. Indeed, there is authority for this in *Ali K. Virani's* case (1), where a submission by the defence that the seizure by the police was *novus actus tertii* was rejected expressly ([1958] E.A. at p. 211) because

“the appellants were aware at the time of sale that in certain events their title would be brought seriously into question, and that there was a possibility of police intervention in aid of an alleged superior title.”

Counsel for the respondents went on to argue that the action of the police and the magistrate was not necessarily lawful, although protected by law; that all that s. 20 of the Police Act and s. 121 of the Criminal Procedure Code do is to protect the police and the magistrate from the action in trespass to which they would otherwise be liable unless they could show a lack of title or a defective title in the possessor of the goods or a superior title in someone else, one of which had to be strictly proved. With respect, I am not persuaded by that argument. I think that actions by police and magistrates under s. 20 of the Police Act and s. 121 of the Criminal Procedure Code, those actions being in strict compliance with the requirements of those sections, are lawful, and not merely protected, acts, whatever the true ownership of the goods.

On this leg of the appeal, counsel for the respondents sought to rely again on his argument that the appellant company had failed to prove theft as alleged in the plaint and the particulars on which he claims its entire case depended. In this connection, I cannot agree. I do not think that cl. 8 of the plaint, which alleged the seizure by the police, must necessarily be linked with cl. 7, which alleged the theft, even though cl. 8 stated that the seizure by the police was “on the ground that the said Boot Polish were stolen property of Reckitt Coleman & Chiswick (E.A.), Limited.” The appellant company proved the seizure by the police, which was an undoubted disturbance of possession and the only question, to my mind, is whether it was sufficiently linked with the sale by the respondents.

In this connection, counsel for the appellant was able to point to various matters which suggest that the respondents knew that their title was liable to challenge. In the first place, there was evidence that when the goods were delivered to the appellant company, they were not accompanied by any voucher and that no voucher was ever furnished, in spite of three requests. Secondly, the managing director of the appellant company gave evidence that after the goods had been seized, he asked a member of the respondent firm where the goods had come from and received the reply – “I have not sold you boot polish, I have sold you grams.” Thirdly, when the advocates for the appellant company wrote to the respondents before suit, asking for the refund of the purchase price of the goods, the advocates for the respondents replied that

“Our clients never sold any Nugget Black Boot Polish to your clients on 3rd December, 1961 or on any other date.”

Furthermore, the defence began with two unambiguous statements:

- “1. The Plaintiff never bought any goods at any price from the Defendants, either as alleged or at all.
2. The Plaintiff never paid any price for any goods to the Defendants as alleged or at all.”

And, as I said earlier, the question whether there had been a sale of boot polish by the respondents to the appellant company was one of the agreed issues at the trial, only to be abandoned by the respondents approximately half way through the trial. Counsel for the respondents argued that these matters should not be regarded as sinister and he sought to explain the denial of a sale by saying that the respondents had acted as agents for another company. Apart from the fact that there is not one iota of evidence to support that statement, it would not, even if true, justify the denials made by the respondents. If they had been acting as agents, they could have pleaded that fact. Counsel for the respondents also submitted that this aspect of the matter had not been argued in the lower court. This is true. As, however, the alleged breach of warranty was pleaded and the evidence to support the argument was adduced, I do not think we should reject it now.

In my opinion, there is evidence to indicate that the respondents had at all material times at least some doubt as to their title to the goods, and I think this provides a sufficient nexus with the disturbance of the appellant company's possession to exclude the argument that the action of the police was *novus actus tertii*. I think the appellant company did establish a *prima facie* case of breach of implied warranty and that the onus then shifted to the respondents. The respondents, however, elected to call no evidence. They relied on the argument that the evidence for the appellant company was inconsistent with its pleadings and so contradictory in itself as to be insufficient to establish its case. As I have said, I think that argument is entitled to prevail as regards the alleged breach of condition but I think it fails as regards the alleged breach of warranty.

I would therefore allow the appeal and set aside the judgment and decree of the High Court. I would order that judgment be entered for the appellant company. We were not addressed on the quantum of damages, but the normal basis is the difference between the contract price and the market value and the only evidence on the latter was that the 12 cases sold by the appellant company realized a profit of "nearly" 8 per centum. I would therefore allow shs. 4,483/50, the price of the 32 cases, plus 8 per centum, that is shs. 358/68, a total of shs. 4,842/18. I would award the appellant company its costs in the High Court, except the costs of the proceedings on September 18 and 19, 1962, which were awarded to the respondents by Templeton, J., and the costs of the proceedings before Connell, J., which I am satisfied he intended to award to the respondents. In connection with the order of Templeton, J., I would add, for the avoidance of doubt, that I am satisfied that when he said "All costs to date" he intended to refer only to the costs of the hearing and not to previous matters such as instructions and pleadings. I would not allow costs on the higher scale, requested by counsel for the appellant, because I consider the costs have already been unduly inflated, largely through faulty pleadings on both sides. As regards the costs in this court, I would make no order for costs of the motion, because, although it failed, the appellant company was at fault in that the memorandum of appeal was not in compliance with the rules. I would allow the appellant company the costs of the appeal, excluding the cost of drawing the memorandum of appeal, and I would certify for two counsel.

Duffus JA: I also agree with the judgment of Spry, J.A., and there will be an order in accordance with his judgment.

Law JA: I agree with the judgment prepared by Spry, J.A., and with the order proposed by him.

Appeal allowed.

For the appellant:

Veljee Devshi & Bakrania, Nairobi

J. M. Nazareth, Q.C., and T. G. Bakrania

For the respondents:

Khanna & Co., Nairobi

D. N. Khanna and A. B. Shah

Kuna Arap Rono v Swaran Singh Dhanjal
[1966] 1 EA 184 (HCK)

Division:	High Court of Kenya at Nakuru
Date of judgment:	26 May 1966
Case Number:	37/1965
Before:	Trevelyan J
Sourced by:	LawAfrica

[1] Appeal – Practice – Appeal to High Court from subordinate court – Plaintiff struck out and claim dismissed – Certified copy of decree or order not filed with appeal – Meaning of “decree” – Whether appeal incompetent.

Editor’s Summary

The appellant had sued the respondent and his plaintiff was struck out and his claim dismissed by the magistrate. On appeal as of right to the High Court a certified copy of the decree or order was not filed with the memorandum of appeal as required by O. 41, r. 1, of the Civil Procedure (Revised) Rules, 1948, and a preliminary objection was taken by the respondent that the appeal was incompetent.

Held – the definition of the word “decree” in s. 2 of the Civil Procedure Act includes the rejection of a plaintiff and the proviso in the section provides that “decree” shall include judgment and that a judgment is appealable notwithstanding the fact that a formal decree in pursuance of such judgment may not have been drawn up; accordingly the appeal was competent.

Preliminary objection overruled.

Cases referred to in judgment:

(1) *F. H. Mohamedbhai & Co., Ltd. v. Yusuf Abdul Ghani* (1952), 19 E.A.C.A. 38.

Judgment

Trevelyan J: The respondent takes the preliminary point that the appeal is incompetent. The argument was put to me on the basis that no certified copy of the decree was filed with the memorandum of appeal as required by O. 41, r. 1 (1) of the Civil Procedure (Revised) Rules, 1948. But when counsel for the appellant said that by the admission that a decree was appropriate the other side had made out his case

for him, counsel for the respondent first said that it was not for him to decide what the Court had done and, finally, that “It seems now to me it is an order”.

In the lower court the magistrate was invited, under O. 6, r. 29, of the Rules, to strike out the plaint, which he did in an order saying:

“I agree with the argument of the defendant’s advocate. Cause of action appears to be failure of consideration but subject matter of the suit was delivered and accepted by the plaintiff. The plaintiff’s plaint is therefore to be struck out . . .”.

Section 2 of the Civil Procedure Act speaks of the rejection of a plaint. Whilst I cannot say that I have read every word of the Act and Rules. I do not think there is anywhere else a similar expression. But under O. 7, r. 11, of the Indian Civil Procedure Rules there are four cases where a “plaint shall be rejected” and the first of them is “Where it does not disclose a cause of action”. I believe that where a plaint is struck out in its entirety it has been rejected. Accordingly the learned senior resident magistrate rejected the appellant’s plaint. Both sides are agreed that he also dismissed his claim.

In 1939 McKinnon, L.J. said:

“ . . . I think we sit here to administer justice, and not to supervise a game of forensic dialectics.”

Indeed we sit here to administer justice. I confess that I do not see why we need a rule such as we have in O. 41, r. 1 (1), which has to be interpreted to mean that if a certified copy of the decree or order appealed from does not accompany a memorandum of appeal, the appeal is for dismissal; presumably even if it is in existence. But the rule is there and must be observed.

Order 6, r. 29, ends:

“All orders made in pursuance of this rule shall be appealable as of right”

but I do not believe that the presiding officer’s reasons for any decision under the rule can only give rise to an “order” as defined in the section. The word “decree”, “shall be deemed to include the rejection of a plaint” so that such rejection is included in the definition. In turn the proviso in the section says that “decree” shall include judgment and that a judgment is appealable notwithstanding that a formal decree may not have been drawn up. That an adjudication from which an appeal lies as an appeal from an order is by s. 2 (a) excluded from the definition of a decree is immaterial because it is a general provision and the rejection of a plaint is specifically dealt with. The word “judgment” is not defined in the Act but in *F. H. Mohamedbhai & Co., Ltd. v. Yusuf Abdul Ghani* (1), the Court of Appeal said that it can never properly be extended to include the reasons given by a court pursuant to the making of an order. What do the magistrate’s reasons amount to in this case? I believe that he conclusively determined the rights of the parties in the suit before him. Section 2 speaks of an adjudication which, so far as the court expressing it is concerned conclusively determines the rights of the parties with regard to all or any of the matters in controversy. Not all orders made under O. 6, r. 29, conclusively determine such rights. But when a plaintiff is told that his plaint discloses no cause of action so that it “is therefore to be struck out” and his claim is dismissed, I am of opinion that the parties rights “in the suit” have conclusively been determined, it mattering not if some other action may be brought on the same facts. The expression “in the suit” means the suit being inquired into at the time, not some other suit. And working, as it were backwards, as a decree is, in s. 2, deemed to include the rejection of a plaint, the reasons leading up to it are a judgment and not just reasons for an order.

I rule against the preliminary point, the costs of which I award to the appellant.

Preliminary objection overruled.

For the appellant:

Lawrence Long & Co., Nakuru

R. B. Varia

For the respondent:

B. R. Patterson-Todd, Nakuru

National and Grindlays Bank, Ltd v Dharamshi Vallabhji and others
[1966] 1 EA 186 (PC)

Division: Privy Council

Date of judgment: 10 May 1966

Case Number: 49/1964
Before: Lord Morris of Borth-y-Gest, Lord Pearce and Lord Pearson
Sourced by: LawAfrica
Appeal from: E.A.C.A. Civil Appeal No. 15 of 1964 on appeal from the Supreme Court of Kenya – Wicks, J.

[1] Chattels transfer – Letter of hypothecation – Letter of hypothecation signed but not attested – Whether valid inter partes – Effect of non-attestation – Chattels Transfer Act (Cap. 28), s. 15 (K.).

[2] Bank – Letter of hypothecation – Signed but not attested – Whether valid inter partes – Effect of non-attestation – Chattels Transfer Act (Cap. 28), s. 15 (K.).

Editor's Summary

The respondents sued for damages for a trespass alleged to have been committed by the appellant bank on October 6, 1960, in taking possession of and removing the respondents' stock-in-trade over which the appellant bank had a letter of hypothecation as security for their overdraft. The letter of hypothecation was signed by the respondents but was not attested as required by s. 15 of the Chattels Transfer Act. During the seizure two of the respondents voluntarily and with knowledge of its contents signed a letter referring to the letter of hypothecation authorising the seizure as the overdraft could not be reduced. The trial proceeded on the basis that only the issue of liability was to be determined initially. The trial judge held that, although the letter of hypothecation was wholly void for lack of attestation of the grantor's signatures, nevertheless no trespass had been committed, because the respondents had by their letter of October 6, given consent to the acts of the appellant bank in taking possession of and removing the respondents' stock-in-trade. On appeal, the Court of Appeal, while agreeing that the letter of hypothecation was wholly void, reversed his decision on the ground that no fresh consent, independent of the letter of hypothecation, had been given on October 6, 1960. On appeal to the Privy Council it was conceded that, if the letter of hypothecation was valid between the parties, the acts of the appellant bank were justified under a clause in the letter of hypothecation and the only issues in the appeal were (a) whether the letter of hypothecation was valid as between the parties, and (b) if not, whether some fresh consent, independent of the letter of hypothecation, was given by the respondents on October 6, 1960. For the respondents it was contended that by reason of the absence of attestation the letter of hypothecation was wholly void under s. 15 of the Chattels Transfer Act and for the appellant it was contended that though the letter of hypothecation may have been invalid for the purpose of registration under the Chattels Transfer Act, it was valid between the parties.

Held – (Lord Morris of Borth-y-Gest dissenting):

- (i) that the letter of October 6, 1960, did not seek to create a new right but merely to confirm a position which created rights under the letter of hypothecation;
- (ii) In the absence of any express provision in s. 15 of the Chattels Transfer Act as to the consequence of non-attestation of an instrument, the natural implication from the provisions of s. 15 and its context and the scheme of the Act was that an unattested instrument is valid between parties but incapable of registration and ineffective against other persons; accordingly the respondents were bound by the letter of hypothecation and the seizure was justified.

Appeal allowed.

[**Editorial Note.** Decision of the Court of Appeal reported at [1964] E.A. 442, reversed.]

Cases referred to in judgment:

- (1) *Kavanagh v. Gudge* (1844), 7 Man. and G. 316; 13 L.J.P.C. 99; 135 E.R. 132.
- (2) *Marshall v. Green* (1875), 1 C.P.D. 35; 45 L.J.Q.B. 153; 33 L.T. 404.
- (3) *G. M. Dodhia v. National and Grindlays Bank, Ltd.*, Kenya Supreme Court Civil Case No. 914 of 1962 (unreported).
- (4) *Davis v. Goodman* (1880), 5 C.P.D. 128; [1874-80] All E.R. Rep. 996; 49 L.J.Q.B. 344; 42 L.T. 288.
- (5) *Te Aro Loan Co. v. Cameron* (1895), 14 N.Z.L.R. 411.
- (6) *R. v. Dibb Ido* (1897), 15 N.Z.L.R. 591.
- (7) *Lee v. Parke's Official Assignee in Bankruptcy* (1903), 22 N.Z.L.R. 747.
- (8) *D'Emden v. Pedder* (1904), 1 C.L.R. 91.
- (9) *Webb v. Outrim*, [1907] A.C. 81; 76 L.J.P.C. 25; 95 L.T. 850.
- (10) *Liverpool Borough Bank v. Turner* (1860), 1 John. & H. 159; 3 L.T. 84; 70 E.R. 703; *affirmed*, 2 De G.F. & J. 502; 45 E.R. 715.

Judgment

Lord Pearson: delivered the following majority judgment of the Board: This is an appeal by the defendant bank, by leave of the Court of Appeal for Eastern Africa, from a judgment of that Court given at Nairobi on September 2, 1964, allowing the plaintiffs' appeal from a judgment of the Supreme Court of Kenya (Wicks, J.) given on May 31, 1963. The action is for damages for a trespass alleged to have been committed by the defendant bank on October 6, 1960, in taking possession of and removing the plaintiffs' stock-in-trade under a letter of hypothecation which had been given to the defendant bank by the plaintiffs as security for their overdraft. The trial proceeded on the basis that only the issue of liability was to be determined initially. Wicks, J., decided in favour of the defendant bank, holding that, although the letter of hypothecation was wholly void for lack of attestation of the grantors' signatures, nevertheless no trespass had been committed, because the plaintiffs had on October 6, 1960, given a consent to the acts of the defendant bank in taking possession of and removing the plaintiffs' stock-in-trade. The Court of Appeal, while agreeing with him that the letter of hypothecation was wholly void, reversed his decision on the ground that no fresh consent, independent of the letter of hypothecation, had been given on October 6, 1960.

In this appeal it has been conceded that, if the letter of hypothecation was valid as between the parties, the acts of the defendant bank were justified under a clause in the letter of hypothecation. The only issues in this appeal are (1) whether the letter of hypothecation was valid as between the parties, and (2) if not, whether some fresh consent, independent of the letter of hypothecation, was given by the plaintiffs on October 6, 1960.

There is not now any dispute as to the facts found by Wicks, J., which were summarised in the

judgment of Newbold, J.A., in the Court of Appeal as follows ([1964] E.A. at p. 444 D-I):

“On April 4, 1960, the plaintiffs opened a banking account with the bank and the bank undertook to provide overdraft facilities to the plaintiffs. The limit of the overdraft facilities then agreed was Shs. 140,000/- and the conditions attached thereto were that the amount was repayable on demand, that the account had to be conducted to the satisfaction of the bank and that

the agreement was to come up for review on April 30, 1961. As security for such overdraft facilities the plaintiffs gave to the bank, inter alia, a letter of hypothecation over their stock-in-trade and certain other articles specified in the letter. This letter of hypothecation was signed by the plaintiffs on April 4, 1960, after the printed form had been duly filled in, though it was dated May 9, 1960. The letter of hypothecation was neither attested nor registered. Subsequently, on May 13, 1960, the bank wrote to the plaintiffs confirming the overdraft facilities. On a number of occasions the plaintiffs exceeded the limits of the overdraft facilities and on September 29, 1960, the bank extended the limit of the overdraft facilities by Shs. 10,000/- to Shs. 150,000/-, but this extension was for a period only until October 3, 1960. In consideration of this extension certain documents, including an extension of the limit set out in the letter of hypothecation, were handed to the plaintiffs for signature on the understanding that they would be returned to the bank. These documents were not returned and cheques were drawn in excess of the additional limit. On the morning of October 6, 1960, an official of the bank went to the premises of the plaintiffs with fresh documents and with instructions either to have the original documents, if signed, returned to the bank or to obtain the signature of the plaintiffs to these fresh documents. That morning the plaintiffs signed the fresh documents, which included an extension of the letter of hypothecation and a new guarantee. Later that morning two of the plaintiffs went to the bank and showed to an official of the bank a draft letter setting out that the plaintiffs were unable to pay their creditors, whereupon the plaintiffs were asked to reduce their overdraft to the agreed limit of Shs. 140,000/- and stated that they were unable to do so. Following upon, and consequent upon, this the bank, without any formal notice, caused the stock-in-trade and other articles of the plaintiffs to be seized under a power contained in the letter of hypothecation on the afternoon of October 6, and during the course of the seizure two of the plaintiffs voluntarily and with knowledge of its contents signed a letter, dated October 6, referring to the letter of hypothecation and authorising the seizure as the overdraft could not be reduced as promised.”

The letter of October 6, 1960, as set out in the Record, was as follows:

“Manager,

National and Grindlays Bank Limited

Nairobi.

Dear Sir,

With reference to the letter of Hypothecation executed by us on 9th May, 1960, we hereby authorise you to take over our stocks sowing machines & spares as we regret we are not in a position to reduce our overdraft as promised.

Yours faithfully,

Dharamshi Vallabhji & Bros.

(Sgd.) K. D. Vaghela

(Sgd.) Dharamshi Vallabhji

(in Gujarati)”

The second issue can be quickly disposed of. Their Lordships agree with Newbold, J.A. ([1964] E.A. at p. 445 E) that “as the bank has seized the goods of the plaintiffs, then the bank is liable in trespass unless it can justify the seizure”. It is clear from Bullen and Leake’s *Precedents of Pleading* (3rd Edn., pp. 414-415 and 740 and 11th Edn., pp. 637-639, 1046, 1119-1120) that it is not for

the plaintiffs to prove that the seizure was against their will: they prove the seizure, and it is for the defendant bank to show that the seizure was by leave and licence of the plaintiffs. *Kavanagh v. Gudge* (1) illustrates the sequence of pleadings under the old system. If the letters of hypothecation were wholly void they conferred no effective leave or licence. *Marshall v. Green* (2) per Lord Coleridge, C.J. (1 C.P.D. at p. 38). Their Lordships further agree with Newbold, J.A. ([1964] E.A. at p. 448 H) that the letter of October 6, 1960

“does not seek to create any new rights but merely to confirm a position which created rights under the letter of hypothecation. This being so, if no rights existed under the letter of hypothecation then no rights are created by this letter.”

The sole remaining issue is as to the validity as between the parties of the letter of hypothecation, which had no attestation of the signatures of the plaintiffs as grantors. The plaintiffs contend that by reason of the absence of attestation the letter of hypothecation was wholly void under s. 15 of the Chattels Transfer Act, 1930, of Kenya (which may conveniently be called “the Kenya Act”). The defendant bank contends that, though the letter of hypothecation may have been invalid for the purposes of registration under the Kenya Act, it was valid as between the parties.

The choice between these two rival contentions depends on the construction of the latter part of s. 15 of the Kenya Act. The express provisions of the section, its context and the scheme of the Act have to be considered. Decisions of New Zealand Courts on similar provisions in a New Zealand Act have to be taken into account. Also the English and New Zealand Acts relating to bills of sale may have some relevance as precursors of the Kenya Act.

The context of s. 15 is important and it is necessary to set out the principal provisions.

“Registration

4. All persons shall be deemed to have notice of an instrument and of the contents thereof when and so soon as such instrument has been registered as provided by this Ordinance:
5. Registration of an instrument shall be effected by filing the same and an affidavit in the form numbered (1) in the First Schedule hereto or to the like effect, in the office of the Registrar.
- 6.(1) The period within which an instrument may be registered is twenty-one days from the day on which it was executed. . . .

Effect of Non-Registration

- 13(1) Every instrument, unless registered in the manner hereinbefore provided, shall upon the expiration of the time for registration, or if the time for registration is extended by the Supreme Court, then upon the expiration of such extended time, be deemed fraudulent and void as against –
 - (a) the official receiver or trustee in bankruptcy of the estate of the person whose chattels or any of them are comprised in any such instrument;
 - (b) the assignee or trustee acting under any assignment for the benefit of the creditors of such person;
 - (c) any person seizing the chattels or any part thereof comprised in any such instrument, in execution of the process of any court authorizing the seizure of the chattels of the person by whom or concerning whose chattels such instrument was made, and against every person on whose behalf such process was issued;

so far as regards the property in or right to the possession of any chattels comprised in or affected by the instrument which, at or after the time of such bankruptcy, or of the execution by the grantor of such assignment for the benefit of his creditors, or of the execution of such process (as the case may be), and after the expiration of the period within which the instrument is required to be registered, are in the possession or apparent possession of the person making or giving the instrument, or of any person against whom the process was issued under or in the execution of which the instrument was made or given, as the case may be. . . .

14. No unregistered instrument comprising any chattels whatsoever shall, without express notice, be valid and effectual as against any bona fide purchaser or mortgagee for valuable consideration, or as against any person bona fide selling or dealing with such chattels as auctioneer or dealer or agent in the ordinary course of his business.”

As to Instruments Generally

15. Sealing shall not be essential to the validity of any instrument; but every execution of an instrument shall be attested by at least one witness, who shall add to his signature his residence and occupation.
16. Every instrument shall be deemed to be made on the day on which it is executed, and shall take effect from the time of its registration.
17. Every instrument shall contain or shall have endorsed thereon or annexed thereto a schedule of the chattels comprised therein, and, save as is otherwise expressly provided by this Ordinance, shall give a good title only to the chattels described in the said schedule, and shall be void as against the persons mentioned in sections 13 and 14 of this Ordinance in respect of any chattels not so described.
18. Save as is otherwise expressly provided by this Ordinance, an instrument shall be void as against the persons mentioned in sections 13 and 14 of this Ordinance in respect of any chattels which the grantor acquires or becomes entitled to after the time of the execution of the instrument.
21. Nothing in this Ordinance shall be deemed to affect any law for the time being in force –
 - (a) prescribing any formalities to be observed on or about the execution of instruments within the meaning of this Ordinance; or
 - (b) conferring or securing any rights or claims under or in respect of any such instrument.”

Form of Instruments

23. Where an instrument is executed after the execution of a prior instrument which has never been registered, and comprises all or any of the chattels comprised in such prior instrument, then if such subsequent instrument is given as a security for the same debt as is secured by the prior instrument, or for any part of such debt, it shall, to the extent to which it is a security for the same debt or part thereof, and so far as respects the chattels comprised in the prior instrument, be void as against the persons mentioned in sections 13 and 14 of this Ordinance, unless it is proved to the court having cognizance of the case that the subsequent instrument was bona fide given for the purpose of correcting some material error in the prior instrument, and not for the purpose of evading this Ordinance.”

Entry of Satisfaction

- 34(1) In the case of an instrument, upon the production to the Registrar of a memorandum of satisfaction in the form numbered (5) in the First

Schedule hereto or to the like effect, signed by the grantee thereof or his attorney, discharging the chattels comprised in such instrument or any specified part thereof from the moneys secured thereby or any specified part thereof, or from the performance of the obligation thereby secured or any specified part thereof, and on production of such instrument and payment of a fee of five shillings, the Registrar shall file such memorandum and make an entry thereof in the register book on the page where the instrument is registered.

- (2) The execution of such memorandum shall be attested by at least one witness, who shall add to his signature his residence and occupation and shall be verified by the affidavit of that witness."

Section 15 of the Kenya Act imposes a requirement that every execution of an instrument shall be attested. It can be called a "mandatory" provision because it imperatively requires that something shall be done. But the section does not say what the consequence is to be if the thing is not done. It does not say what purpose will fail to be achieved if there is no attestation. Thus the consequence of non-attestation has to be ascertained by implication from the context and the scheme of the Act.

In the immediate context, the wording of the first part of the section and the word "but" introducing the second part suggest that the consequence of non-attestation is invalidity, but the invalidity may be a total invalidity for all purposes or a limited invalidity for some special purposes only.

Section 21 is important, because it tends to show that neither part of s. 15 is to be understood in an unrestricted sense. The first part, providing that "sealing shall not be essential to the validity of any instrument", only means that no requirement of sealing is imposed for the purposes of this Act: it does not exempt an instrument from any requirement of sealing which may be imposed by any other law for the time being in force. That seems to be the effect of s. 21 (a) in its impact upon the first part of s. 15. The second part of s. 15 does not mean by implication that an unattested instrument is invalid for all purposes: some other law for the time being in force may confer or secure rights or claims under or in respect of it. That seems to be the effect of s. 21 (b) in its impact on the second part of s. 15. There is a probable conclusion that for an unattested instrument the invalidity which is to be implied from s. 15 is not a total invalidity for all purposes but a limited invalidity for some special purposes only. The nature of the special purposes must be gathered from the context and the scheme of the Act.

It was contended on behalf of the plaintiffs that s. 21 should not be taken into account in the construction of s. 15, because s. 21 (though it is said to have been referred to in the argument of a previous case, *Dodhia v. National and Grindlays Bank, Ltd.* (3)) was not specifically relied upon or referred to in the present case in the argument before Wicks, J., and the Court of Appeal or in their judgments or in the appellants' case in this appeal. Certainly it would have been most helpful to have the assistance of Wicks, J., and the Court of Appeal in considering the bearing of s. 21. It would, however, be too artificial, in considering the context of s. 15, to ignore s. 21 as though it did not form part of the relevant context, which it plainly does, being in the same group of sections. The relevance of s. 21 for purposes of construction does not depend upon the existence or nature or contents of any particular "law for the time being in force" of a description referred to in para. (a) or para. (b) of the section. The elucidation of such matters would require detailed knowledge of the laws of Kenya. The relevance of the section for purposes of construction depends solely on the saving for any such law that there may be, and this saving is plain on the face of the section and could not properly be ignored when the context

of s. 15 is being taken into account for purposes of construction. There are of course other relevant parts of the context in addition to s. 21.

Section 5 provides that registration of an instrument is to be effected by filing it together with an affidavit in the form numbered (1) in the First Schedule. That form of affidavit contains para. 5

“The name subscribed in the said instrument as that of the witness attesting the due execution thereof by the said [name of grantor] is in the proper hand writing of me this deponent.”

Thus it is necessary for the scheme of registration that there shall be an attesting witness. That could be left to inference, but it is more natural to have an express provision in the Act, and such express provision is to be found in the second part of s. 15, which thus completes the scheme of registration. That is a sufficient explanation of the second part of s. 15: an instrument has to be attested as otherwise it cannot be registered. No wider consequence of non-attestation needs to be implied.

Registration is needed in order to make the instrument effective against persons who are not parties to it, but without registration it can be effective as between the parties to it. That appears by necessary implication from ss. 13 and 14. Then the provision of s. 16 that “every instrument . . . shall take effect from the time of its registration” must be given a limited meaning, i.e., that the instrument takes effect as a registered instrument, good as against persons who are not parties to it, from the time of its registration. That is in harmony with the limited meaning which may be ascribed to s. 15. More generally it can be said that s. 15 is surrounded by ss. 13, 14, 16, 17, 18 and 19, and all of these are concerned with registration and show that the absence of registration affects only relations with persons who are not parties to the instrument and does not affect the relations between the parties to the instrument. It is natural to attribute to s. 15 an effect which is connected and in harmony with the surrounding sections. If the implied invalidity of an unattested instrument is limited to purposes of registration, this result is achieved. The argument that there is a contrast between the limited invalidity imposed by the surrounding sections and a supposed total invalidity imposed by s. 15 breaks down because it involves a *petitio principii*. Section 15 does not by its express terms impose any invalidity. The invalidity is only implied, and the extent of it has to be inferred from (inter alia) the surrounding sections, and the natural inference from them is that the invalidity is limited.

Section 23 also provides for limited invalidity. Sections 34-37 are part of the scheme of registration, providing for the termination of the rights conferred by registration. Under s. 34 (2) the memorandum of satisfaction, which is to be filed and entered in the register, is required to be attested, and the wording of the requirement is the same as that used in the second part of s. 15. Both provisions seem to belong to the scheme of registration.

In the absence of any express provision in s. 15 as to the consequence of non-attestation of an instrument, the natural implication from the provisions of s. 15 and its context and the scheme of the Act is that an unattested instrument is valid between the parties but incapable of registration and so ineffective against other persons.

This construction of the Kenya Act is supported by cases decided in New Zealand. Owing to the statutory history these cases are relevant to the construction of the Kenya Act and may reasonably be regarded as having considerable persuasive authority for that purpose.

In New Zealand the bills of sale legislation began in 1856 with an “Act for preventing frauds upon creditors by secret bills of sale of personal chattels”,

modelled on the English Act of 1854 with the same title. There were numerous later Acts in both countries. Under the English Act of 1878 it was held that upon the true construction of ss. 8 and 10 an unattested instrument was not invalidated as between the parties. *Davis v. Goodman* (4). The English Act of 1882 contained in ss. 8 and 9 new provisions whereby non-compliance with certain requirements rendered a bill of sale given by way of security invalid even as between the parties. These new provisions were not adopted in New Zealand. There was in New Zealand an Act of 1889 called the Chattels Transfer Act, 1889 – “An Act to consolidate and simplify the law relating to transfer of chattels”. Section 49 of that Act provided that

“Sealing shall not be essential to the validity of any instrument: but any execution of an instrument or memorandum of satisfaction shall be attested by one witness, to whose signature shall be added the residence and occupation of such witness.”

Three cases were decided in New Zealand under that s. 49 of the Chattels Transfer Act, 1889.

The first was *Te Aro Loan Co. v. Cameron* (5). The particulars of claim alleged that by instrument by way of security from the defendants to the plaintiff company, and by virtue of the covenants implied therein by the Chattels Transfer Act, 1889, the defendants covenanted to pay to the plaintiff company a certain sum and interest. The witness who attested the defendants’ signatures to the instrument described himself as “J. Brown, law clerk, Wellington”. The magistrate non-suited the plaintiff company on the ground that the occupation and address of the attesting witness were not sufficiently set out to comply with s. 49 of the Act; that the document was therefore not a valid instrument under that Act, and no covenants were therefore implied in it by virtue of the Act; and that the plaintiff company could not, therefore, sustain the action. The plaintiff company appealed to the Supreme Court. Williams, J., allowed the appeal on the ground that the occupation and address of the attesting witness were sufficiently set out. Therefore it was not necessary for him to decide, and he did not decide, what the position would have been if the attestation had been defective. He made these observations, after holding that the attestation was sufficient (14 N.Z.L.R. at p. 417):

“If this were not so, still, the evidence showed that the defendant was indebted to the plaintiff company in the amount claimed, though possibly not in covenant. It may be that this section 98 of the Magistrates Courts Act, 1893 [which gave a limited power of amendment] would prevent the magistrate from giving judgment if a simple contract debt only were proved. If that is so, it would be a great misfortune; but I am certainly not prepared to decide that such is the law.”

The second New Zealand case was *Regina v. Dibb Ido* (6). It was a criminal appeal by way of case stated. The prisoner had bought and taken delivery of a bicycle on December 24, 1896, at a price of £22 10s., giving a bill of sale for £17 10s. and promising to pay £5 on December 28. The bill of sale was not attested. The prisoner made no payment, and on December 30 he pledged the bicycle with a pawnbroker for £8 10s., having stated in answer to a question from the pawnbroker that the bicycle was his. He was prosecuted and convicted on two counts (1) for having fraudulently obtained the sum of £8 10s. by false pretences (2) under s. 52 of the Act for having, as grantor of an instrument by way of security, defrauded the grantor. In the appeal counsel for the prisoner contended that as the bill of sale had not been attested it was not an “instrument by way of security” within the meaning of the Act, and so no offence had been committed under s. 52. He also contended that, as the document was

not an instrument by way of security, the bicycle was the prisoner's and he made no false pretence. In the course of the argument Edwards, J., said (15 N.Z.L.R. at p. 594):

"There cannot be any doubt that at common law this document would have passed the property back to the vendors. The whole question is, as I understand it, whether this Chattels Transfer Act takes away the rights which these parties would have had at common law."

A little later Williams, J., who presided, said (15 N.Z.L.R. at p. 594): "We are satisfied as far as the first count is concerned", and the argument proceeded only on the second count. The judgment of the Court (consisting of Williams, Denniston, Conolly and Edwards, JJ.) was delivered by Conolly, J., who said (15 N.Z.L.R. at p. 595):

"The 52nd clause of the Chattels Transfer Act, 1889, being a penal clause, must be read strictly and its provisions should not be held to extend to instruments which are not clearly within its scope. In our opinion it only applies to valid instruments by way of security under the Act. The document given by the prisoner is not such an instrument, since s. 49, which is imperative, has not been complied with. The conviction under the second count of the indictment was therefore bad. But, as we intimated on the hearing, the conviction under the first count of the indictment was good; and the conviction is therefore affirmed."

Thus the reasoning of the appeal court for upholding the conviction on the first count was not fully set out, but it can be inferred to have been that, although the bill of sale was not a valid instrument for the purposes of the Act, it was nevertheless valid as between the parties and had the effect of re-vesting the ownership of the bicycle in the sellers. That interpretation of the decision in the *Dibb Ido* case (6) is confirmed by the headnote in that case and also by the judgment of Denniston, J. (who had been a member of the appeal court in *Dibb Ido*) given in the third New Zealand case. This was *Lee v. Parke's Official Assignee in Bankruptcy* (7). There were several points in issue between the assignee in bankruptcy and the holder of a bill of sale granted by the bankrupt. It will be sufficient for the present purpose to set out extracts from the first paragraph of the judgment (22 N.Z.L.R. at p. 750).

"In my opinion non-compliance with . . . the provision in s. 49 requiring every instrument to be attested by one witness in the manner therein provided, does not invalidate such instrument as between the parties. There is nothing in the Act which declares that such non-compliance shall . . . have such effect. The result of such non-compliance would seem only to make the instrument incapable of registration under the Act, or, if registered, to deprive the grantee of the benefit of such registration. Under the English Act of 1882 the consequence of non-registration is to avoid the instrument even between grantor and grantee: there is no such provision in the New Zealand Act. In *Davis v. Goodman* (4) it was held that non-compliance with the provision which required attestation by a solicitor did not render the instrument void as between grantor and grantee. In *Reg. v. Dibb Ido* (6) the Court of Appeal held that an unattested instrument given by way of security was effectual as between the parties to transfer the property to the grantee. And see *Te Aro Loan Company v. Cameron* (5)."

That is a clear statement of the ratio decidendi of the Court of Appeal of New Zealand in the *Dibb Ido* case (6). Apparently there has not been any later case in New Zealand on this point after the judgment in *Lee's* case (7), which may thus be said to have held the field for more than sixty years.

The New Zealand Act of 1889 and certain other Acts were consolidated by the Chattels Transfer Act, 1908. Section 49 of the Act of 1889 was replaced by two provisions in the Act of 1908. Section 17 provided that:

“Sealing shall not be essential to the validity of any instrument; but every execution of an instrument shall be attested by at least one witness, who shall add to his signature his residence and occupation.”

Section 37 (2), referring to a memorandum of satisfaction, provided that:

“The execution of such memorandum shall be attested by at least one witness, who shall add to his signature his residence and occupation, and shall be verified by the affidavit of that witness.”

Those provisions were repeated verbatim in ss. 20 and 42 (2) of the Chattels Transfer Act, 1924 (another consolidating Act) of New Zealand and in ss. 15 and 34 (2) of the Kenya Act under which the question at issue in this appeal arises. It is not disputed that the Kenya Act was modelled on the New Zealand Act of 1924. It seems clear that the decisions in the New Zealand cases of *Dibb Ido* (6) and *Lee* (7) to which reference has been made must apply to s. 20 of the New Zealand Act of 1924 and so be relevant authorities for the construction of s. 15 of the Kenya Act, and may properly be considered important authorities for that purpose.

Counsel for the defendant sought to attribute a greater effect to the New Zealand decisions. Reference was made to passages in Craies on Statute Law (6th Edn.), at pp. 139, 141, 172. At p. 139 there is a citation from an Australian case *D’Emden v. Pedder* (8) (1 C.L.R. at p. 110), cited in *Webb v. Outrim* (9) ([1907] A.C. at p. 89):

“When a particular form of legislative enactment which has received authoritative interpretation, whether by judicial decision or by a long course of practice, is adopted in the framing of a later statute, it is a sound rule of construction to hold that the words so adopted were intended by the legislature to bear the meaning which had been so put upon them.”

As there are other grounds for the decision of this appeal, it is not necessary to go into this point at length. It is enough to say that *prima facie* it seems unsafe to assume that, when the Kenya Act of 1930 was originally made as an ordinance modelled on the New Zealand Act of 1924, the ordinance-making authority must necessarily be supposed to have intended to import into Kenya the case-law of New Zealand decided under a previous New Zealand Act. Newbold, J. A., said in the course of his judgment ([1964] E.A. at p. 446 E-F):

“I accept that when Kenya adopts the legislature of a Commonwealth country with a similar system of law, then, in construing the provisions of the adopted legislation regard should be had to the judicial decisions of the Commonwealth country on the meaning of the equivalent section. I accept that proposition subject to two qualifications: first that any such decision is not absolutely binding and may be disregarded if in the view of the East African Court the decision is clearly wrong; and, secondly, that such decisions disclose a consistent interpretation of the section in question and are not at variance one with another.”

No fault is to be found in this statement of principle, but in the view of the majority of their Lordships it was not correctly applied in the present case, because examination of the New Zealand decisions shows there was no inconsistency or variance in them and their construction of the relevant provisions was correct.

For the reasons which have been given the appeal will be allowed and the case will be remitted to the High Court of Kenya for judgment to be entered in favour of the defendant bank. The plaintiff respondents must pay to the defendant appellant its costs of the action and of the appeal and cross-appeal to the Court of Appeal for Eastern Africa and of this appeal.

Lord Morris of Borth-Y-Gest (dissenting): I have the misfortune to differ in my conclusion from that which has been reached by the majority of the Board. With diffidence I feel that I must express my view though I can do so quite shortly.

It seems clear that the seizure by the bank of the plaintiff's goods would constitute trespass unless the bank were permitted and entitled to act as they did. In agreement with the majority of the Board and in agreement with all the members of the Court of Appeal I consider that the events which took place in the month of October, 1960, did not by themselves give such entitlement.

On the basis of that view the only asserted justification of the seizure was that clause 9 of the letter of hypothecation gave a right to seize. The bank relied therefore upon the letter of hypothecation. Without it they had no answer to a claim in trespass. Within the definition contained in s. 2 of the Chattels Transfer Ordinance the letter of hypothecation was unquestionably an "Instrument". It gave a licence to take possession of chattels as security for any debt. It was precisely that license which the bank exercised. It was vital therefore for the bank to have a valid instrument.

In a section (s. 15) of the Ordinance which was the first section in a group of sections under the heading "As to Instruments Generally" it was provided that:

"Sealing shall not be essential to the validity of any instrument; but every execution of an instrument shall be attested by at least one witness, who shall add to his signature his residence and occupation."

That section deals with validity. In my view it lays down that though sealing is not essential to validity attestation is. The word "but" points to that conclusion. So in my view does the word "shall". That word is imperative. There is a mandatory requirement that an instrument must be attested. There must be at least one witness. Furthermore there is a mandatory requirement that a witness must add his signature and also his residence and also his occupation. In contrast to something that is not "essential" those mandatory requirements are essential. Even if the word "essential" did not by itself convey its own meaning it is made plain that the word is used in the sense of being essential to validity. An unattested instrument is therefore not a valid instrument. Though the Ordinance contains provisions for registration (and prescribes the effect of non-registration) the path to registration does not and cannot begin until there is a valid instrument. Whether in the present case if the bank had secured a valid instrument they would or would not have had an instrument that could take some effect before registration (see s. 16) and whether registration would in this particular case, having regard to the terms of the instrument and to the provisions of s. 18, have been of much or only of limited advantage, are questions which in my view need not now be considered.

The Chattels Transfer Ordinance which was dated June 13, 1930, was "An Ordinance to make Provision Relating to Chattel Securities and the Transfer of Chattels". It is clear that it was modelled upon New Zealand legislation which in turn was considerably derived from English legislation. Section 15 of the Ordinance may be seen to correspond to certain sections in the

New Zealand Acts of 1924 and of 1908 which in turn derive from s. 49 of an earlier New Zealand Act of 1889. That section however had no ancestry in the English Acts.

Though it is interesting and valuable to study the legislation which was undoubtedly used as a guide and basis by those who drafted the Kenya Ordinance the problem which now arises is essentially one of interpreting the Kenya Ordinance as enacted. I do not think that it should be assumed that the Ordinance was enacted on the basis that there was full knowledge of and full acceptance of any decisions in the courts of the country whose legislation was being used as a guide and basis in drafting. When problems of construction arise any such decisions will however naturally be studied in a search for guidance and will be considered with special respect. I have endeavoured so to consider the New Zealand cases cited to the Board.

The present case depends in my view upon the construction of the words in s. 15. I do not find any assistance from a consideration of s. 21 (the effect of which section does not appear to have been canvassed in the Court of Appeal). That section is a saving clause. There is a saving of the effect of "any law for the time being in force" prescribing formalities concerning the execution of instruments or securing rights under them. It was not suggested that there was any such law that called for consideration.

In my view the words in s. 15 are mandatory and obligatory. The section enacts that every execution of an instrument "shall be attested" in a particular way. It so enacts in the context of "validity". I do not think that it would be reasonable to read into the section some words to the effect that in certain circumstances an instrument that has not been attested as directed (and which therefore lacks validity) may nevertheless (e.g. as between the parties) be regarded as only partially invalid. There are no such words. Nor are there any words to the effect that the section is only to apply to instruments which it is proposed to register. In *The Liverpool Borough Bank v. Turner* (10) Page Wood, V.-C., said (1 John. & H. at p. 169):

"If the legislature enacts that a transaction must be carried out in a particular way the words that otherwise it shall be invalid at law and in equity are mere surplusage."

On appeal the Lord Chancellor (Lord Campbell) in approving the judgment of the Vice-Chancellor said (2 De G.F. & J. at pp. 507, 508):

"No universal rule can be laid down for the construction of statutes as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of courts of justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be construed."

In regard to s. 15 where there is a mandatory direction in a section dealing with the validity of instruments I consider that the provision as to attestation is a positive and obligatory one: failing obedience to it an instrument is not a valid instrument. That being so it seems to me that in failing to have the instrument attested the bank failed to secure a valid instrument. When the time came that they wished to depend upon a clause in an instrument in order to protect themselves from an act that, if done without permission, would be trespass they only had an instrument which by reason of non-compliance with the law was an invalid instrument. The courts ought not in my view in defiance of the law to give recognition to it. I agree therefore with the judgment of

Wicks, J., in regard to this point and on this and on all other points with the three judgments in the Court of Appeal.

Appeal allowed.

For the appellant:

Sanderson, Lee, Morgan, Price & Co., London
Bryan O'Donovan, Q.C. (Kenya) and *E. G. Nugee*

For the respondents:

Merriman, White & Co., London
E. F. N. Gratiaen, Q.C. and *R. K. Handoo*

Dinshaw Byramjee & Sons, Ltd v The Attorney General of Kenya
[1966] 1 EA 198 (CAN)

Division: Court of Appeal at Nairobi
Date of judgment: 8 June 1966
Case Number: 25/1965
Before: Sir Clement de Lestang Ag P, Spry and Law JJA
Sourced by: LawAfrica
Appeal from: The High Court of Kenya – Sir John Ainley, C.J.

[1] Land registration – Charge under Registration of Titles Act (Cap. 281) – Charge created by purported trustees of charitable trust – Trustees registered as proprietors against title – Charge registered – Direction by court that appointment of trustee irregular – Whether new trustees created a valid charge – Registration of Titles Ordinance (Cap. 160 of 1948), s. 23 (K.).

Editor's Summary

By a settlement made in 1942 a settlor established a charitable trust appointing himself and one R as the trustees, a power of appointing new trustees being vested in the settlor during his lifetime and after his death in the trustee or trustees for the time being. In July, 1946, the settlor appointed B and G to be trustees with himself in the place of R, and by an indenture made in August, 1953, the settlor purported to remove the said B from the trusteeship thus leaving himself and G as the remaining trustees. The settlor died in March, 1955, leaving G as sole trustee who then purported to appoint K as trustee with himself. The removal of B, the death of the settlor and the appointment of K were treated by the Registrar of Titles as transmissions and registered against the titles of two parcels of land registered under the Registration of Titles Act. Relying on the register, the appellants lent money to G and K who executed a

charge in their favour over the two parcels of land. The charge was registered and endorsed on the Grant in July 1955. In July, 1958, the Registrar of Titles lodged a caveat against the title of the two properties without notice to the appellant. The appellant, who had obtained an order of sale of the charged property, discovered the caveat in April, 1962, with the result that the sale could not take place. In August, 1962, the Registrar of Titles referred the legal points arising to the Chief Justice for directions who ruled that the settlor had no power to remove a trustee save in accordance with s. 36 of the Trustees Act; that B was not validly removed from the office of trustee; that K was not validly appointed as trustee and that B and G were the present trustees of the charitable trust. The Chief Justice further held that G and K were not capable of charging the two parcels of land; that the land had not been lawfully charged; that it could not be sold under a non-existent charge and that an appropriate correction of the register should be made. It was against that part of the judgment declaring the appellant's charge invalid that the appellants appealed. It was submitted for the appellants that the title of a person appearing on the

register as proprietor is, as against third parties acting innocently, conclusive of that fact and that a charge created by such proprietor is valid notwithstanding a defect in his title. Consequently it was argued that as the charge was executed by G and K who appear on the register as proprietors as trustees and was duly registered, it was a valid charge notwithstanding the wrongful removal of B and the invalid appointment of K as trustees.

Held –

- (i) the title of a person appearing on the register as proprietor is, as against third parties acting innocently, conclusive of that fact and a charge created by such a person is valid notwithstanding irregularities in the registration of earlier instruments;
- (ii) the charge created by G and K became a valid and effectual instrument and its enforcement could proceed.

Appeal allowed. Declaration that the charge is valid and effective and order that the caveats be removed.

Cases referred to in judgment:

- (1) *Govindji Popatlal v. Nathoo Visandji*, [1962] E.A. 372 (P.C.).

The following judgments were read:

Judgment

Sir Clement de Lestang Ag P: This is an appeal against part only of the decision of the Supreme Court (now the High Court of Kenya). The relevant facts giving rise to the appeal are the following. By a Settlement dated November 16, 1942, one Sheikh Fazal Ilahi (hereinafter referred to as “the settlor”) established a charitable trust appointing himself and one Sheikh Abdul Rashid as the trustees. By cl. 13 of the Settlement Deed the power of appointing new trustees was vested in the settlor during his lifetime and after his death in the trustee or trustees for the time being. By an Indenture dated July 5, 1946, the settlor appointed Sheikh Mohamed Bashir and Sheikh Abdul Ghafur to be trustees with himself in the place of Sheikh Abdul Rashid. These three trustees appear as registered proprietors as lessees from the Crown under the Registration of Titles Ordinance (Cap. 160 of the 1948 Revised Edition of the Laws of Kenya, hereinafter referred to as “the Ordinance”) of several properties including two parcels of land numbered L.R. 2863/5 and L.R. 2863/6 (Mombasa) which had originally been the subject of a Grant from the Crown to the predecessors in title of the three trustees. By an Indenture dated August 5, 1953, the settlor purported to remove Sheikh Mohamed Bashir from the trusteeship thus leaving himself and Sheikh Abdul Ghafur as the remaining trustees. The settlor died on March 22, 1955, leaving Sheikh Abdul Ghafur as sole trustee. By an Indenture dated May 2, 1955, Sheikh Abdul Ghafur purported to appoint one Karam Bibi as trustee with himself.

The removal of Sheikh Mohamed Bashir, the death of the settlor and the appointment of Karam Bibi were treated by the Registrar of Titles as transmissions and registered against the titles of the two portions of land above mentioned, so that as at June 3, 1955, the register showed Karam Bibi and Sheikh Abdul Ghafur as the proprietors as trustees of the two parcels of land.

Relying on the register, the appellants lent money to the two persons shown on the register as trustees

who executed a charge in their favour against the two portions of land in question. The charge was registered and endorsed on the Grant on July 7, 1955. In July, 1958, the Registrar of Titles lodged a caveat against the title of these two properties. Notice of the caveat was not given to

the appellants who only discovered it in April, 1962, after they had obtained an order for the sale of the properties. As a result the sale could not take place. In August, 1962, the Registrar of Titles, acting under s. 63 of the Ordinance, referred the following matters for determination by the Supreme Court, namely:

- “(a) Whether or not the Settlor had power to remove a trustee;
- (b) Did the Second Appointment effectually remove the said Sheikh Mohamed Bashir from the office of trustee;
- (c) Did the Third Appointment effectually appoint Karam Bibi as trustee;
- (d) Who are the present trustees of the said Sheikh Fazal Ilahi Noordin Charitable Trust;
- (e) What action, if any, should be taken by the Registrar of Titles consequent upon the decisions of the court;

and to give such other directions touching the above Trust and the properties aforementioned as the court thinks fit.”

At the trial the Grant with the endorsements thereon was tendered in evidence by the appellants. The learned Chief Justice answered the questions as follows:

- “(a) No, save in accordance with the terms of section 36 of the Trustees Ordinance.
- (b) No.
- (c) No.
- (d) Abdul Ghafur and Mohamed Bashir.
- (e) I can only order that such corrections be made in the register as will reflect the true position. That is to say that the register must be so altered that it is made clear that up to the death of the settlor the trustees were the settlor, Mohamed Bashir and Abdul Ghafur, and that after the said death the trustees were Mohamed Bashir and Abdul Ghafur and that no other trustee has been appointed subsequent to the death of the settlor. I consider that under s. 63 of the Registration of Titles Act I have power to make such an order and I do so.”

In the ruling which the Chief Justice had given earlier in the proceedings he had said, “What follows from any determination of that question (the question of the validity of Bashir’s removal as trustee and one of the registered proprietors of the land in question) may await argument. The fourth and fifth respondents may have nothing to trouble about when this question has been answered or they may be in a position to pose different questions”. It would appear that the appellants, who were the fifth respondents in the court below, expected to have the opportunity of addressing the Chief Justice fully in regard to the validity of the charge after his determination of the questions propounded in the reference and as a result of this misunderstanding the learned Chief Justice did not have the benefit of full arguments on the point. Nevertheless he considered the position of the appellants and said:

“The fifth respondent argues that s. 23 of the Registration of Titles Act renders him ‘the absolute and indefeasible holder’ of a charge upon the land on the security of which he made a loan. He points out, correctly, that there was no fraud or misrepresentation to which he was proved a party. I find it very unpleasant to argue with this perfectly innocent party, but it does appear to me that s. 23 deals solely with ownership, or as the Act prefers to call it ‘proprietorship’. This respondent has not been issued with a certificate of title, and I cannot hold that the grantee of a charge which has been registered is in the position of a proprietor to whom a certificate of title has

been issued. This charge was executed by persons who were not in fact and law entitled to execute it. Abdul Ghafur and Karam Bibi were not capable of charging trust land, though they appeared from the register to have that capacity. This land has not been lawfully charged and it cannot be sold under a non-existent charge. Since there has been the negotiation of what purports to be a charge but is in fact and law no charge an appropriate correction of the register must be made, and I so order.”

It is against that part of the judgment declaring the appellants’ charge invalid that the appellants appeal. Originally the Attorney-General, on behalf of the Registrar of Titles, was cited as sole respondent to the appeal but this court directed that all persons who were parties to the reference should be served with the notice of appeal. As a result, not only the Attorney-General but Sheikh Mohamed Bashir and Sheikh Abdul Ghafur were made respondents and were represented by counsel at the hearing of the appeal. Of the three respondents only Sheikh Mohamed Bashir resisted the appeal, the others abiding by the decision of the court on the validity of the charge and desiring to be heard solely on the question of costs.

Counsel for the appellants, submitted that the title of a person appearing on the register as proprietor is, as against third parties acting innocently, conclusive of that fact and that a charge created by such a proprietor is valid notwithstanding a defect in his title. Consequently he argues that as the charge in the present case was executed by Sheikh Abdul Ghafur and Karam Bibi who appear on the register as proprietors as trustees of the land in question and was duly registered, it is a valid charge notwithstanding the wrongful removal of Sheikh Mohamed Bashir and the invalid appointment of Karam Bibi as trustees. In my view counsel for the appellants contention is correct. In *Govindji Popatlal v. Nathoo Visandji* (1) ([1962] E.A. (P.C.) at p. 376) the Judicial Committee of the Privy Council adopted without reservation a statement by Windham, J.A. in this court in the same case regarding the sanctity of the register. Indeed, were it otherwise the principal object of the Ordinance, which is founded on the Torrens system of land registration, would be defeated. My reasons for upholding the charge in the present case can be stated quite shortly by reference to the relevant provisions of the Ordinance:

Section 21 provides for the issue and registration of grants of land, which are to be in the form B (1) or B (2) in the First Schedule. Section 22 provides that when the land comprised in a grant has been transferred or transmitted, a certificate of title shall be issued to the new proprietor. These sections are contained in Part IV of the Ordinance, which is entitled “Grants, Transfers and Transmissions of Land”. Part VI of the Ordinance, which is entitled “Transfers”, deals with the same subject but in a somewhat inconsistent way. Section 35 (inter alia) repeats the provision contained in s. 22 that on a transfer of the whole of the land comprised in a grant, the grant is to be cancelled, and a certificate of title is to be issued to the transferee. Section 36, however, provides that in lieu of cancelling the grant and issuing a certificate of title, the registrar may endorse on the grant a memorandum of the transfer and deliver the grant so endorsed to the transferee. The section continues:

“and every grant . . . with such memorandum shall be as affectual for the purpose of evidencing title, and for all other purposes of this Ordinance, as if the old certificate had been cancelled and a new certificate had been issued to the transferee in his own name . . .”

and goes on to provide that this process may be repeated on subsequent transfers.

This was the procedure that was followed in the present case. A grant was issued in the form B (1) and registered, and all subsequent dealings were endorsed

on it. The position was, therefore, that immediately before the registration of the charge in favour of the appellants, Karam Bibi and Sheikh Abdul Ghafur, as the registered proprietors, were to be treated for all purposes as though a certificate of title had been issued in their names. As such, they had, under the provisions of s. 23 of the Ordinance, a title which was indefeasible except on the ground of fraud or misrepresentation.

As registered proprietors, Karam Bibi and Sheikh Abdul Ghafur, charged the lands in favour of the appellants to secure a loan. It does not appear to have been disputed that the loan was made and it was accepted by all parties that the appellants had not been guilty of or a party to any fraud or misrepresentation. The position as regards the charge is governed by s. 32 of the Ordinance (to which no reference was made at the hearing before us). That section, after providing that unregistered instruments are ineffectual, continues as follows:

“but upon the registration of any instrument in manner hereinbefore prescribed the land specified in such instrument shall . . . become liable as security in manner and subject to the agreements, conditions and contingencies set forth and specified in such instrument . . .”

It is clear, therefore, that whatever irregularities may have occurred in the registration of earlier instruments, the charge created by the registered proprietors of the land became on registration a valid and effectual instrument.

I would accordingly allow the appeal, set aside the decision of the court below that the appellants' charge is invalid and the order for its removal from the register, declare the charge valid and effective and order the removal of the caveats against the two portions of land in question so that the order for sale which the appellants have obtained may be proceeded with. I would also direct that the proper trustees, namely Sheikh Abdul Ghafur and Sheikh Mohamed Bashir, should execute the necessary transfer following the sale.

With regard to costs, I would not disturb the order for costs in the court below except as regards the appellants in whose favour I would make an order for costs and direct that they be added to the security. I would make a similar order in respect of the appellants' costs in the appeal with a certificate for two counsel. I would order the other parties to bear their own costs.

Spry Ag VP: I agree.

Law JA: I also agree.

Appeal allowed. Declaration that the charge is valid and effective and order that the caveats be removed.

For the appellants:

J. M. Nazareth, Q.C. and E. P. Nowrojee, Nairobi

For the respondent:

The Attorney-General, Kenya

R. S. Sehmi (State Attorney, Kenya)

For Sheikh Mohamed Bashir:

Winayah & Co., Nairobi

T. R. Johar

For Sheikh Abdul Ghafur:

Johar & Co., Nairobi

J. K. Winayak

Cheleta Coffee Plantations, Ltd v Eric Mehlsen
[1966] 1 EA 203 (CAN)

Division:	Court of Appeal at Nairobi
Date of ruling:	21 April 1966
Case Number:	1/1966
Before:	Sir Clement de Lestang VP, Duffus and Spry JJA
Sourced by:	LawAfrica
Appeal from:	The High Court of Kenya – Sherrin, J

[1] *Contract – Construction – Meaning of “calendar year”, “calendar month” and “crop year” in bonus clause of service agreement – Express words disregarded because inserted by mistake and produce unlikely result.*

[2] *Evidence – Document – Admissibility of documents to show mistaken insertion of word in written contract – Evidence Act, 1963, s. 98 proviso (1), (K.).*

[3] *Pleading – Amendment of plaint in Court of Appeal – Delay – Whether prejudice or estoppel – Relevant facts not in issue subject of amendment.*

Editor’s Summary

The appellant company agreed to employ the respondent for four years as a coffee plantation manager on the terms contained in a document quoted at the beginning of the judgment. The respondent terminated his services after seven months at the end of January, 1964 and claimed the balance of his bonus under the agreement calculated as if it was due on the 1963/4 crop in full as well as on 1/12 of the 1964/5 crop. The appellant counterclaimed for the recovery of bonus overpaid on the basis that it was only due for 7/12 of the 1963/4 crop. The words “calendar year” and “any year’s crop” could be construed to support both these contentions. The respondent’s calculation was accepted in the High Court on the basis that “calendar year” meant any year starting January 1, and that the year’s crop in question was picked between August, 1963 and the end of January, 1964. On appeal the appellant contended that the word “calendar” was inserted by inadvertence in copying the respondent’s previous contract, or else that the “calendar year” in question started on July 1, that the previous contract was admissible to contradict the contract sued upon under s. 98 proviso (1) of the Evidence Act, 1963, and to prove the insertion by mistake. The respondent cross-appealed against the trial judge’s refusal to allow an amendment to the plaint to correct the tonnage on which the bonus was claimed as a result of evidence coming to light in

cross-examination that a further 8.67 tons of clean coffee should have been included. The earlier tonnage was based on the appellant's admission of facts pursuant to notice. There was admittedly delay in the application to amend but otherwise the appellant was not prejudiced and no estoppel arose on counsel's admission.

Held –

- (i) the ordinary meaning of “calendar year” is any year starting on January 1, unlike a “calendar month” starting any day in a month; “crop year” in this context referred to the year beginning about July when the picking of a new crop started;
- (ii) the insertion of “calendar” in the contractual document was a mistake because it was copied from a previous contract where it had a different effect, evidence of which was admissible under s. 98 proviso (1) of the Evidence Act;
- (iii) if any weight was given to the word “calendar” the result would be unlikely and a reasonable supposition, based on a general intention gathered from the rest of the document, that the bonus was tied to each contract or crop year would fail; accordingly the word “calendar” would be disregarded;
- (iv) the amendment to the plaint asked for by the respondent would be granted since there was no agreement between counsel on the tonnage (not directly in

issue) but merely an acceptance of a figure that was incorrect in the light of evidence and of the construction adopted by the court of the words limiting the relevant period; the appellant was not prejudiced and no estoppel arose.

Appeal and cross-appeal allowed.

Cases referred to in judgment:

- (1) *Freeman v. Read* (1863), 4 B. & S. 174; 122 E.R. 425.
- (2) *Migotti v. Colvill* (1879), 4 C.P.D. 233.
- (3) *C. A. Stewart & Co. v. Phs. van Ommeren (London), Ltd.*, [1918] 2 K.B. 560.
- (4) *Simpson v. Margitson* (1847), 11 Q.B. 23; 116 E.R. 383.
- (5) *Gibson v. Barton* (1875), L.R. 10 Q.B. 329.
- (6) *I.R. Comrs. v. Hobhouse*, [1956] 3 All E.R. 594.
- (7) *Mills v. United Counties Bank, Ltd.*, [1912] 1 Ch. 231.
- (8) *H. Clark (Doncaster), Ltd. v. Wilkinson*, [1965] 2 W.L.R. 751.

The following judgments were read:

Judgment

Spry JA: It is common ground that the respondent was employed by the appellant company as manager of a coffee estate and that the terms of the contract were those contained in a document dated June, 27 1963. The terms set out in this document include the following paragraph:

“4. A Bonus of £7 for every ton of clean coffee from the estate, except that when any year’s crop exceeds 100 tons, you will be paid a Bonus of £10 per ton on such excess.

In the event of your leaving the company during a calendar year, a proportionate part of this Bonus will be paid to you.

This Bonus agreement will include the 1963/64 crop.”

The period of the respondent’s service was deemed to have begun on July 1, 1963, and it ended on January 31, 1964.

The respondent claimed that on a true interpretation of para. 4, quoted above, he was entitled to receive

- (a) a bonus on the whole 1963/64 crop; as originally calculated this amounts to £7 per ton on 100 tons and £10 per ton on 65 tons, a sum of Shs. 27,000/-; and
- (b) 1/12 of a similar bonus on the 1964/65 crop estimated at 90 tons, that is, Shs. 1,050/-.

The appellant company, on the other hand, asserted that the respondent was only entitled to 7/12 of the bonus on the 1963/64 crop, that is Shs. 15,750/-, and counterclaimed for the sum of Shs. 1,549/- alleged to have been overpaid in the form of advances.

The dispute went to the High Court of Kenya, where a number of issues were argued with which this

appeal is not concerned. On the entitlement to the bonus, the only substantial matter in issue, the learned trial judge held that the expression "calendar year" as used in para. 4 meant a year beginning on the first day of January, that since nothing was said about proportionate bonus except if the respondent left during a calendar year, the respondent was entitled to a bonus on the entire 1963/64 crop, and that he was entitled to 1/12 of the bonus on the 1964/65 crop. Against that decision the appellant company has appealed.

The first argument advanced by counsel for the appellant company, was that the learned judge had erred in his interpretation of the expression "calendar year". He submitted that the expression is not a term of art and has not been

interpreted judicially. On the other hand, it has been held that “calendar month” may be used to cover the period from any day in a month to the corresponding day in the succeeding month and counsel for the appellant submitted that “calendar year” should be capable of similar interpretation.

I accept the interpretation of “calendar month” argued by counsel for the appellant. The English law is clearly contained in *Freeman v. Read* (1), *Migotti v. Colvill* (2) and *C. A. Stewart & Co. v. Phs. van Ommeren (London), Ltd.* (3) (even though, in *Migotti v. Colvill* (2), Bramwell, L.J., observed that “the term calendar month is not strictly applicable, except to the particular months named in the calendar, and is inaccurate as applied to a period composed of two parts of different months”) and I see no reason to doubt that the law of Kenya follows the English law in this respect. On the other hand, I doubt if any analogy can properly be drawn. The word “calendar” was formerly used in relation to months to distinguish them from lunar months, since in the temporal courts, as opposed to the ecclesiastical courts, a month meant, except in mercantile transactions, a lunar month (*Simpson v. Margitson* (4)) and there was no similar difficulty relating to years. Furthermore, although I have not been able to discover any authoritative interpretation of the words “calendar year”, I have found instances where the words have been used judicially to describe the period from January 1 to December 31, in *Gibson v. Barton* (5) and in *I.R. Comrs. v. Hobhouse* (6). In both cases the court was only concerned with the meaning of the word “year” and in dealing with the conflicting submissions, found it convenient to use the expression “calendar year” for the year beginning on January 1. Furthermore, I think that is not only the proper meaning (as being a year according to the calendar – e.g., 1966) but it is also the current meaning likely to be intended by ordinary persons entering into contracts. I think therefore that the learned judge was correct in his interpretation.

Counsel for the appellant argued in the alternative that the word “calendar” appeared in the document by inadvertence and, on an interpretation of the document as a whole, should be rejected. Counsel’s submission was that it was clearly the intention, reading the document as a whole, that the respondent should receive a bonus on each year’s crop and that if he served for less than the four years of the contract, he should receive a proportion of the bonus for any broken year.

As regards the meaning of “any year’s crop” in para. 4, evidence was called – and this appears to have been properly admissible to resolve a latent ambiguity (Evidence Act (No. 46 of 1963), s. 101). This shows that coffee is normally picked on the estate between July and January (according to the respondent’s evidence) or between July and April (according to the evidence of Mr. Storey, an accountant familiar with the estate). There is no picking in May or June. The learned judge remarked that he had “no doubt whatever that to the coffee farmer this gap indicates the end of one crop and the beginning of the next”. Evidence was also given that the Coffee Marketing Board’s year runs from October 1 to September 30, and this is relevant because the bonus was to be based on tonnage of clean coffee, which meant coffee that had been processed by the Board.

It would seem then that the word “year” may have any one of four meanings in relation to the document under consideration and it need not, of course, have the same meaning in each place where it is used (*I.R. Comrs. v. Hobhouse* (6), reluctant as a court may be to find inconsistency of usage. It might mean a year of the contract, that is, a year beginning on July 1; it might mean a crop year; it might mean a Coffee Marketing Board year; it might mean a calendar year. Of these, the first two may be regarded for practical purposes as the same.

To my mind, it is most likely that when the parties, in the first sentence of para. 4, spoke of a year's crop, they intended "year" to mean a crop year. That seems to me to be the natural meaning of the words used. It is possible that the parties may have intended a Coffee Marketing Board year, but I think it is unlikely and I think this opinion is reinforced by the obvious practical advantages resulting from the virtual correspondence of the crop year with the contract year. It is to my mind inconceivable that they could have intended to refer to a calendar year's crop, which, on the evidence, would have been difficult if not impossible to calculate.

If I am correct so far, the introduction of the expression "calendar year" in the second sentence of para. 4 seems inexplicable. It would seem that provision for a proportional bonus would only be necessary if the appellant left the company otherwise than at the end of a year of the contract. The document is silent as to when the bonus was to be paid but it is clear that it was to be calculated on an annual basis and it is therefore reasonable to suppose that it was to be paid annually, that is to say, at the end of each year of the contract. This would present no practical difficulty, since the total of the year's crop would then be known, subject possibly to minor adjustment.

Another approach is to look at the potential results. In the events which occurred, the appellant claims to be entitled to what is, in effect, a bonus for thirteen months in respect of seven months' service. Counsel for the respondent submitted that the explanation lay in the fact that the appellant had had unfortunate experiences in his earlier employment and found himself in a position to obtain favourable terms, since, as it was the beginning of the picking season, the appellant company's need for a manager was urgent. That might explain generous terms but it does not explain, to my satisfaction, why the appellant should receive, for his work during the 1963/64 season a proportional bonus on the 1964/65 crop. If the apportionment were to be on the basis of a calendar year, I should have thought the bonus should be assessed on the same basis but, as I have said, reading the document as a whole, and particularly having regard to the third sentence of para. 4, I am satisfied that was not the intention. Again, if the respondent had completed his contract, he would, on the basis of his present claim, apparently have been entitled not only to four annual bonuses but also to a bonus in respect of his last six months' service, since he would have been leaving in the course of a calendar year: I cannot believe that result was ever intended.

For these reasons, I think the word "calendar" was inadvertently inserted in the document and ought to be discarded. I am strengthened in this belief by a perusal of the respondent's previous contract and by his evidence that for his contract with the appellant company he copied out this earlier contract with appropriate amendments. The previous contract is, therefore, comparable with a draft and while a draft cannot, in my opinion, be looked at as evidence of negotiations, it may, I think, be used, under proviso (1) to s. 98 of the Evidence Act, to show a mistake. The previous contract ran from January 1, 1960, and in respect of that contract, a year of the contract and a calendar year meant the same. The first two sentences of para. 4 are identical with the corresponding sentences of the previous contract and I think it is obvious that the word "calendar" was copied inadvertently, the respondent overlooking the fact that it was inappropriate as the new contract was not to begin on January 1.

I come then to the third sentence of para. 4, on which the respondent founded his claim to a full bonus on the 1963/64 crop. It was argued on his behalf that the sentence was meaningless unless it operated to ensure that he would in any event receive this bonus. For the appellant company, on the other hand, it was argued that there was evidence (that of a Mr. Gullberg) that the 1963/64 picking

had begun before July 1, 1963, and that the effect of the sentence under consideration was to make it clear that the bonus provision applied to the whole of the 1963/64 crop, notwithstanding that some part of it had been picked before the contract of service began. I do not find either of these interpretations entirely satisfactory but as between them, I prefer the latter. Nothing would have been easier than to say that the appellant was to receive full bonus on the 1963/64 crop, whatever the period of his actual service, if that had been the intention. On the contrary, the document merely says that the bonus agreement will “include” that crop. Where the terms of a contract are in writing and deal expressly with any particular matter, the courts will not imply any provision relating to that matter (*Mills v. United Counties Bank, Ltd.* (7)) and it seems to me that that is what we are being asked to do.

For the reasons I have given, I am of the opinion that the intention behind para. 4, as it is to be deduced from the expressions used, was that each year’s work would entitle the respondent to a bonus, which would be based on the quantity of clean coffee produced in the crop year corresponding to the year of the contract (which bonus for the first year would be based on the entire 1963/64 crop) and that if he left the appellant company in the course of any year of the contract he would receive the appropriate proportion of the bonus that he would otherwise have received for that year. I think therefore that this appeal must succeed.

I have in this judgment deliberately refrained from referring to a considerable part of the evidence given, without objection, in the lower court because it appears to me to have been directed towards showing the intentions of the parties during the negotiations and as such to have been inadmissible in the interpretation of the document which sets out the terms of the contract between them.

There was a cross-appeal which was only argued on one ground. After the case for the appellant company (then the defendant) had been closed and its counsel had addressed the trial court, counsel for the respondent (plaintiff), at the close of his address, asked leave to amend the plaint. The amendment sought was to increase the tonnage of coffee on which bonus was claimed by 8.67 tons. The plaint had been based on information furnished by the appellant company that the clean coffee yielded by the 1963/64 crop amounted to 165 tons: it appeared from a document put to the respondent in cross-examination that the correct figure was 173.67 tons. The learned trial judge refused leave. When he came to pass judgment, he said:

“I refused leave to amend on the ground that the application was made too late.

I have reconsidered the matter and think that I was wrong in the reason I gave for refusing. Early in the hearing counsel informed me that the figure had been agreed at 165 tons. It has not been suggested that the defendants wilfully deceived the plaintiff and I consider that the agreement between counsel must be adhered to.”

Counsel for the respondent submitted that leave should have been given, in order that justice might be done. The agreement between counsel had been based on the reply to a notice to admit facts and was vitiated by the discovery of the true facts. He submitted that leave to amend whenever sought would not have made necessary the calling of further evidence.

I think, with respect, that the considered reason given by the learned judge was erroneous. In England, an admission made by counsel may always be withdrawn unless it is such as to have given rise to an estoppel (*H. Clark (Doncaster), Ltd v. Wilkinson* (8)) and I am of the opinion that the position is the same in

Kenya. The “agreement” was no more than an acceptance by the respondent’s counsel of a figure provided by the appellant company; it was not a compromise or settlement and the appellant company did not act on it to its detriment.

There is no question that the court had power, under O. VI, r. 18, of the Civil Procedure (Revised) Rules, 1948, to allow the amendment, if the interests of justice so required. An application for amendment should, however, be made at the earliest possible moment. I have little doubt that amendment would have been allowed had application been made immediately it became apparent that the actual tonnage for the 1963/64 season might be higher than the figure on which the plaint was based. Having regard, however, to the late stage at which the application was made, it is necessary to consider whether, had the application been made earlier, further evidence might have been necessary.

The position is a somewhat curious one. The plaint alleged that the tonnage of the 1963/64 crop was 165, and this was impliedly admitted in the defence filed by the appellant company. Subsequently, by a Notice to Admit Facts under O. XII, r. 5, the respondent required the appellant company to admit that the 1963/64 crop amounted to 165 tons, and this was admitted, subject to the qualification that:

“The period of 1963/64 crop covers the whole of 1963 and part of 1964.”

an observation which I find a little difficult to understand. The respondent, in examination in chief said that the crop was 165 tons. In cross-examination, an unsigned list of deliveries was put to him, when he said:

“I have a list now handed to me Ex. B. I accept the figures as correct although it is not the figure I was given to begin with.”

That list showed total deliveries between August, 1963, and May, 1964, as 173.67 tons. In re-examination, he said:

“Chandaria told me that the tonnage on which my claim should be based was 165 tons. I had no means of checking it. According to figures I have been shown today it is a mistake.”

The respondent was also, in cross-examination, shown and accepted a form issued by the Coffee Marketing Board, which confirmed the first item in that list, that is to say that 8.67 tons of coffee were delivered to the Board on August 30, 1963. The respondent gave evidence that the last receipt (known as an Out Turn) from the Board in respect of a year’s crop would be received in June and no attempt was made to challenge that evidence. It would appear, therefore, that the 8.67 tons delivered on August 30, 1963, formed part of the crop for the 1963/64 crop year, although included in the Board’s 1962/63 year.

It is apparent from the record that the appellant company was not in any way seeking to impugn the evidence regarding the 8.67 tons – indeed it was the company’s own evidence – but was merely concerned to show that it was delivered in the Board’s 1962/63 year. In those circumstances I cannot see how any additional evidence could have assisted the appellant company’s case had the amendment sought been applied for earlier. It is not the facts that are in issue but only the interpretation of the facts. I am, therefore, inclined to think, though not without hesitation, that the interests of justice would best have been served by allowing the application. A judicial discretion is not lightly to be interfered with, but as in this case the discretion was, in my view, exercised for a wrong reason, I think this court may and should reverse the learned judge’s decision, notwithstanding the delay in making application.

I would therefore allow the appeal and also the cross-appeal so far as it relates to the application for leave to amend the plaint. In my view, the respondent was entitled under his contract with the appellant

company to commission in

respect of the 1963/64 crop based on seven months' service. The crop being 173.67 tons of clean coffee and the rate of commission £7 per ton on the first 100 tons and £10 per ton thereafter, the commission payable was 7/12 of Shs. 28,734/-, which amounts to Shs. 16,761/50. I would therefore set aside the judgment and decree of the learned trial judge and order that the respondent's suit be dismissed and the appellant company's counterclaim be allowed but only to the extent of Shs. 537/50. As, on this basis, the appellant company would substantially be successful, I would award it costs in the lower court of the suit and counterclaim. I would award the appellant company the costs of the appeal and the respondent the costs of the cross-appeal.

Sir Clement De Lestang VP: I agree and there will be an order in the terms proposed.

Duffus JA: I also agree.

Appeal and cross-appeal allowed.

For the appellant:

Shah & Shah, Nairobi

Ramnik Shah

For the respondent:

Hamilton Harrison & Mathews, Nairobi

H. N. Armstrong

Bomben Marlo v Republic
[1966] 1 EA 209 (HCT)

Division:	High Court of Tanzania at Dar-es-Salaam
Date of judgment:	23 December 1965
Case Number:	378/1965
Before:	Biron J
Sourced by:	LawAfrica

[1] Road traffic – In charge whilst efficiency impaired by drink – Whether offence if not on a road or highway – Whether definition of road or highway is different under the Traffic Ordinance from that under English Road Traffic Act – Special reasons – Evidence necessary in considering special reasons – Distinction between driving and being in charge.

Editor's Summary

The appellant was charged with being in charge of a motor vehicle on a road whilst his efficiency as a driver was impaired by drink. He was convicted on his own plea and he was sentenced to a fine of Shs.

100/- or imprisonment for three months in default. He was also disqualified from holding or obtaining a driving licence for a period of twelve months. On appeal to this court from the order of disqualification, it was submitted that the offence was not committed on a road or highway. The proceedings were accordingly remitted to the district court to hear evidence and make a finding in respect of such submission. On hearing further evidence and visiting the locus in quo the district court, applying the English authorities on the definition of road or public place in the English Road Traffic Act, found that it was not a road or highway within the meaning of the Traffic Ordinance.

Held –

- (i) the definition of road in the Traffic Ordinance is much wider than in the English Road Traffic Act and would include a private road;
- (ii) the appellant was charged and convicted under s. 49 (1) of the Traffic Ordinance of being in charge of a vehicle on a road whilst his efficiency as a driver was impaired by drink but the section did not postulate either a road or public place or create ambiguity;

- (iii) the section appears in Part V of the Ordinance, which is headed “Traffic on Roads” and such a heading cannot be incorporated into the section, as headings form no part of a statute and cannot be called in aid except to clarify an ambiguity, or if not inconsistent with the express wording of a particular provision; so the court would not be justified in incorporating it into the section and limiting its operation to a road;
- (iv) fact and circumstances raised and put forward as special reasons for not ordering disqualification should be given as evidence on oath; the fact that the offence was committed on railway property was a special reason.

Per Curiam: as the omission of road in the section is obviously due to inadvertence on the part of the draftsman, and would, as demonstrated, lead to absurd results, the section cries out for the attention of the Legislature with a view to amendment.

Appeal allowed to the extent that the period of disqualification is reduced to six months.

Cases referred to in judgment:

- (1) *Jones v. English*, [1951] 2 All E.R. 855.
- (2) *Muindi Kilonzo v. R.*, [1962] E.A. 667.
- (3) *Buchanan v. Motor Insurers’ Bureau*, [1955] 1 All E.R. 607.
- (4) *Harrison v. Hill*, [1932] S.C. (J.) 1.
- (5) *Smith v. Henderson*, (cited in Wilkinson’s Road Traffic Offences, 4th Edn. 314).

Judgment

Biron J: The appellant was convicted on his own plea, of being in charge of a motor vehicle on a road whilst his efficiency as a driver had been impaired by drink, contrary to s. 49 (1) of the Traffic Ordinance, and he was sentenced to a fine of Shs. 100/- or imprisonment for three months in default. He was also disqualified from holding or obtaining a driving licence for a period of twelve months.

The facts as furnished by the prosecutor were that:

“On the same date and time, the accused was seen driving motor vehicle No. DSZ.438 along a railway street in Dar-es-Salaam. He later drove the vehicle in the second gate opposite the railway station as a result of which he barged the wall of the railway station and his car stopped there. One of the employees of the railway saw the accused resting in his car and refused to go to a police constable who was on duty in the railway station. Constable went to the place where the car was and saw the accused sleeping and was smelling of alcohol. The police constable telephoned traffic police. Constable Chirdian of Traffic Police went to the place and found the accused in the same car sitting. He also smelt him of alcohol. He drew a rough sketch map. The sketch map produced as Exhibit ‘A.1’. The accused was requested by P.C. Chirdian to be examined by Dr. Patel, the Police Pathologist. He went to the dispensary of Dr. Patel and when his permission was sought to be examined, the accused refused. This shows that the accused was afraid of being examined. The report of Dr. Patel produced as Exh. ‘B.1’. The accused was then charged of this offence. He has no previous conviction.”

Learned counsel who appeared for the appellant in the district court is recorded as stating that the facts had been fairly put by the prosecution, and he went on to argue in mitigation and in support of special reasons for not disqualifying,

that no injury was done to any third party or damage to any third party property, the damage, and that slight, being limited to the appellant's own car; that there was no question of excessive speed, that the appellant, as soon as he realised, and I quote, "that he had backed into a wall, he switched off his engine and did not drive away. He sat there quietly, and went along with the police when they arrived"; and that he was a sub-contractor in a small way of business who could not afford the luxury of a chauffeur and "any serious punishment would cripple his business".

In the course of his submissions learned counsel asserted that the offence was not committed on a highway. The learned magistrate, however, found that there were no special reasons within the meaning of the section under which the appellant was convicted, to qualify for the exercise of the court's discretion not to order disqualification, which is mandatory in the absence of special reasons. It is from this finding of the court and consequent order of disqualification that this appeal has been brought.

On the appeal first coming up for hearing I drew attention to counsel's assertion that the offence was not committed on a highway. With the concurrence of learned counsel for the appellant and the Republic the case was remitted to the convicting court with a direction to hear evidence and make a finding in respect of the locus where the offence was actually committed.

I pause to remark, incidentally, at the request of learned State Attorney, that as laid down by the English Court of Appeal in *Jones v. English* (1) ([1951] 2 All E.R. 853, (headnote)):

"Where on a plea of guilty or after evidence has been heard a defendant has been convicted of an offence under the Road Traffic Acts – e.g., driving or being in charge of a motor vehicle while under the influence of drink – for which the penalty of disqualification for holding or obtaining a licence is prescribed by the Act and he puts forward special reasons why the court should not impose disqualification, the justices ought to hear evidence on those matters and not merely to accept statements by the defendant's advocate".

In his judgment, Lord Goddard. C.J., who delivered the judgment of the court, stated (ibid., at p. 854):

"But where, on a plea of guilty or after evidence has been heard, a defendant has been convicted of an offence for which the penalty of disqualification is laid down by Act of Parliament and he seeks to rely on special reasons for the non-imposition of disqualification, he ought to give evidence, and the justices ought to hear evidence on the point and not merely to accept statements. This is highly desirable because the onus is on the defendant to show special reasons why he should not be disqualified".

This case was followed by the East African Court of Appeal in *Muindi Kilonzo v. R.* (2), wherein, in its judgment, the court expressly quoted the above passage from Lord Goddard's judgment and held, quoting from the relevant part of the headnote, that ([1962] E.A. 667):

"where an accused charged under s. 43 (1) of the Traffic Ordinance, 1953, seeks to rely on special reasons for not having an order of disqualification made he ought to give evidence to support his plea of 'special reasons'".

In accordance with the direction of this court the learned magistrate heard further evidence, examined a plan of the site, which the court visited, and found that the locus in quo was neither a road nor a highway.

Although the appellant was expressly charged with being in charge of a motor vehicle on a road etc., the section under which he was charged and convicted, s. 49 of the Traffic Ordinance (Cap. 168 – Supp. 57), reads:

- “49(1) Any person driving or being in charge of a motor vehicle while his efficiency as a driver is impaired by drink or drugs shall be guilty of an offence and liable on conviction to a fine not exceeding two thousand shillings or to imprisonment for a term not exceeding six months or to both such fine and imprisonment.
- (2) A person convicted of an offence under this section shall, unless the court for special reasons thinks fit to order otherwise and without prejudice to the power of the court to order a longer period of disqualification, be disqualified for a period of twelve months from the date of the conviction for holding or obtaining a driving licence.
- (3) Any person against whom a second or subsequent conviction of any of the offences referred to in sub-s. (1) of this section shall be recorded shall be liable to imprisonment for a term not exceeding six months without the option of a fine”.

It will be noted that there is no reference to, or mention of, a road or highway in the section. It would thus appear that a person driving or in charge of a motor vehicle within the curtilage of his own premises, either on the drive or even in his garage, would be guilty of an offence under the section if at the time his efficiency as a driver was impaired by drink or drugs, and he would be liable to be disqualified from holding or obtaining a driving licence. I must confess that this is the first occasion I have had to consider the section in such light, and learned counsel on both sides, both very experienced – learned State Attorney in particular having practised on both sides of the Bar and, I may add, having sat on this very Bench – also expressed themselves to like effect.

Although strictly speaking it is not really necessary in this case to construe the section, as learned counsel for the appellant has expressly stated that he does not in any way challenge the conviction, which he considers proper, and he is appealing only from the order of disqualification, I consider I would be failing in my duty if I did not deal with the section.

The section is obviously, as is the Ordinance, modelled on the English Road Traffic Act, 1930, the relevant part of the relevant section of which, s. 15, reads:

- “(1) Any person who when driving or attempting to drive, or when in charge, of a motor vehicle on a road or other public place is under the influence of drink or a drug to such an extent as to be incapable of having proper control of the vehicle, shall be liable:
- (a) on summary conviction to a fine not exceeding fifty pounds or to imprisonment for a term not exceeding four months, and in the case of a second or subsequent conviction either to a fine not exceeding one hundred pounds or to such imprisonment as aforesaid or to both such fine and imprisonment;
- (b) on conviction on indictment to imprisonment for a term not exceeding six months or to a fine, or to both such imprisonment and fine.
- (2) A person convicted of an offence under this section shall, unless the court for special reasons thinks fit to order otherwise and without prejudice to the power of the court to order a longer period of disqualification, be disqualified for a period of twelve months from the date of the conviction for holding or obtaining a licence”.

The corresponding provision in our Ordinance, s. 49, as noted, makes no mention of, or reference to, a road or public place. This, to my mind, would appear

to be an inadvertent omission on the part of the draftsman, because apart from the fact that if interpreted strictly the section would lead to absurd results, as above demonstrated, the section appears in Part V of the Ordinance which is expressly headed "Traffic on Roads". Headings, however, are not part of a statute and can only be called in aid to explain an ambiguity, or if not inconsistent with the wording of a particular provision, as stated in Maxwell on Interpretation of Statutes (11th Edn.) at p. 48;

"The headings prefixed to sections or sets of sections in some modern statutes are regarded as preambles to those sections. They cannot control the plain words of the statute but they may explain ambiguous words.

A cross-heading in an Act can probably be used as giving the key to the interpretation of the section unless the wording of the section is inconsistent with such interpretation.

'While the court is entitled to look at the headings in an Act of Parliament to resolve any doubt they may have as to ambiguous words, the law is quite clear that you cannot use such headings to give a different effect to clear words in the section, where there cannot be any doubt as to their ordinary meaning'".

In this instant case there is no ambiguity in the wording of the section and to include "on a road" would be inconsistent with the section as it stands, particularly as in every other section, about a dozen of them, creating offences in the same Part V, "on a road" is expressly stipulated in the section. What is more surprising is that the corresponding provisions relating to carriages and animals as opposed to a motor vehicle in s. 49, that is s. 52, is worded:

"Any person driving, propelling or being in charge of any carriage or animal on a road, whilst drunk or while his efficiency for such a purpose is impaired by drink or drugs, shall be guilty of an offence".

Where a statute is capable of one of two constructions, one of which would lead to absurd results, a court is entitled to prefer the other, but where, as in this case, the language of the section is unambiguous, unequivocal and capable of only one interpretation, I know of no authority enabling a court to apply the section otherwise than according to its express wording. Although, as indicated, I feel absolved from ruling on and applying the section in respect of the conviction in this case, to my mind, it cries out for immediate attention and necessary amendment by the Legislature.

As indicated, I feel that the omission of "on a road" (or possibly even "or other public place", as in the English Act) in the section is due to inadvertence on the part of the draftsman, and I propose to consider the section in relation to this case as if the words "on a road" had been included, though I realise that such consideration may well be no more than an academic or obiter exercise.

The learned magistrate found that the locus in quo was neither a road nor a highway within the meaning of the Ordinance, stating in his judgment:

"The Traffic Ordinance Cap. 168, s. 2, lays down that 'road' means any highway and any other road to which the public has access and includes bridges over which a road passes but does not include a road or part of a road within a curtilage of a dwelling house.

This definition of a 'road' is the same as that provided by s. 121 (1) of the Traffic Act, 1931. (1930 is I think intended).

I am of the opinion that when s. 257 of the Traffic Ordinance speaks of 'the public' 'what is meant is the public generally, and not the special class

of members of the public who have occasion for business' to go to the railway station or to any part thereof. I also think that when a statute speaks of the public having 'access' to the road, what is meant is neither that the public has a positive right of its own to access nor that there exists no physical obstruction of greater or less impenetrability, against physical access by the public; but that the public actually and legally enjoys access to it. It is, I think, a certain state of use or possession that is pointed to.

From what Mr. Kassim said and on the impression by the court of the place where the offence was committed, I am of the view that the locus of where the offence was committed was neither a road nor a highway. *Vide Buchanan v. Motor Insurers' Bureau* (3) and find this as a fact".

With respect the definition of "road" in s. 2 of our Traffic Ordinance is not the same as the definition of a road in s. 121 of the English Traffic Act, 1930, which respectively read:

(In our Ordinance) " 'road' means any highway and any other road to which the public has access and includes bridges over which a road passes but does not include a road or part of a road within the curtilage of a dwelling house".

(In the English Traffic Act) "'road' means any highway and any other road to which the public has access, and includes bridges over which a road passes".

The definition in our Ordinance expressly adds:

"but does not include a road or part of a road within the curtilage of a dwelling house",

which is not included in the definition in the English Act.

The learned magistrate expressly relied on the case of *Buchanan v. Motor Insurers' Bureau* (3). In that case McNair, J., relied on the Scottish case of *Harrison v. Hill* (4), stating as follows:

"In the Scottish case, the Lord Justice-General, Lord Clyde, who was considering whether, in the case before him, a road leading from a public highway down to a farmhouse was a road within the meaning of the Road Traffic Act, 1930, had occasion to interpret the definition which I have just read, and said this ([1932] S.C. (J.) at p. 16):

'It is plain, from the terms of the definition, that the class of road intended is wider than the class of public roads to which the public has access in virtue of a positive right belonging to the public, and flowing either from statute or from prescriptive user. A road may therefore be within the definition (1) although it belongs to the class of private roads, and (2) although all that can be said with regard to its availability to the public is that the public "has access" to it. I think that, when the statute speaks of "the public" in this connection, what is meant is the public generally, and not the special class of members of the public who have occasion for business or social purposes to go to the farmhouse or to any part of the farm itself; were it otherwise, the definition might just as well have included all private roads as well as all public highways. I think also that, when the statute speaks of the public having "access" to the road, what is meant is neither (at one extreme) that the public has a positive right of its own to access, nor (at the other extreme) that there exists no physical obstruction of greater or less impenetrability, against physical access by the public; but that the public actually and legally enjoys access to it. It is, I think, a certain state of use or possession that

is pointed to. There must be, as matter of fact, walking or driving by the public on the road, and such walking or driving must be lawfully performed – that is to say, must be permitted or allowed, either expressly or implicitly, by the person or persons to whom the road belongs. I include in permission or allowance the state of matters known in right of way cases as the tolerance of a proprietor”.

The learned magistrate was obviously relying on this passage when he said:

“I am of the opinion that when s. 257 of the Traffic Ordinance speaks of ‘the public’ ‘what is meant is the public generally, and not the special class of members of the public who have occasion for business’ to go to the railway station or to any part thereof. I also think that when a statute speaks of the public having ‘access’ to the road, what is meant is neither that the public has a positive right of its own to access nor that there exists no physical obstruction of greater or less impenetrability, against physical access by the public; but that the public actually and legally enjoys access to it. It is, I think, a certain state of use or possession that is pointed to”.

“Public” is not defined in the English Act, but it is in our Ordinance, at s. 2, as:

“‘public’ refers not only to all persons within the Territory, but also to the persons inhabiting or using any particular place, or any number of such persons, and also to such indeterminate persons as may happen to be affected by the conduct in respect of which such expression is used”.

“Public”, therefore, as used in the definition of “road”, has, to my mind, a much wider meaning than “public” under English law, and embraces a limited class of persons who inhabit or use a particular road. Also, the addition of the qualifying words “but does not include a road or part of a road within the curtilage of a dwelling house” in our definition of “road”, gives a wider meaning to “road” than in the definition in the English Act and would, I think, cover a private road. Therefore the locus in quo, although a road on railway property, as it is open to, and used by, members of the public who have business there, would, to my mind, constitute a road within the definition in our Traffic Ordinance.

This view fortifies me in not interfering with the conviction. To revert to the substance of the appeal, that in respect of the order of disqualification, counsel for the appellant, in canvassing special reasons greatly relied on the fact that very little damage was caused by the appellant and cited in aid of his submission the Scottish case of *Smith v. Henderson* (5) quoted in Wilkinson’s Road Traffic Offences (4th Edn.) at p. 314. With respect, that case is not to the point, as it was concerned with careless driving. Lord Justice-General Cooper is quoted as saying:

“The charge was one to which the respondent pled guilty in circumstances which disclose, shortly stated, that, having on a wet night duly halted at a ‘halt’ sign in Aberdeen, and having had his attention momentarily distracted by a motor car which was turning into the street from which he was emerging, he drove on into the main street, and came into slight contact with another car in the main street, with the result that minor damage was done. The view of the police judge who heard the case is sufficiently indicated by the fact that he imposed a fine of £1, and declined to endorse the licence of the respondent. It seems to me that in the facts which I have very briefly summarised there was material which entitled the police judge to regard the case (as he described it) as presenting ‘a slight degree of carelessness’ and I should be prepared to say that, whenever the circumstances of

the case disclosed a similar slight degree of blameworthiness – resulting perhaps from momentary distraction of a driver's attention or involving little more than an error of judgment in a sudden difficulty – it is then open (to the court), in the proper exercise of a judicial discretion, not to order endorsement of the licence”.

In a case of a driver or person in charge whose efficiency is impaired by drink or drugs, the extent of the damage caused by his driving is not, to my mind, particularly relevant; whether great or small, or even if no damage at all is caused, is purely incidental. The mischief lies in that the driver in such a state is a potential danger and menace to all and sundry as well as to property. It is however noteworthy that the appellant was not charged with driving whilst his efficiency was impaired by drink, but with being in charge of the vehicle whilst in such state. In this respect it is pertinent to quote from the judgment of Lord Goddard, C.J., in *Jones v. English* (1) ([1951] 2 All E.R. at p. 854):

“We have often pointed out in this court that there may be a considerable difference between a case in which the charge is driving under the influence of drink and one where the offence is merely being in charge under the influence of drink”.

It is also not irrelevant that according to the prosecutor, when approached by the constable, the appellant was asleep inside the vehicle.

In all the circumstances, including the fact that the place where the offence was committed was railway property and not open and accessible to the general public, which factor, as conceded by learned State Attorney, would constitute special reasons, the submission by learned counsel for the appellant that there are in this case special reasons within the meaning of the Ordinance, is upheld. The appeal is therefore allowed and the order of disqualification is varied in that the term of twelve months is reduced to six months.

Appeal allowed to the extent that the period of disqualification is reduced to six months.

For the appellant:

Harjit Singh, Dar-es-Salaam

For the respondent:

The Attorney General, Tanzania

O. T. Hamlyn (Senior State Attorney, Tanzania)

West Lake Bus Services Limited v Republic **[1966] 1 EA 217 (HCT)**

Division:	High Court of Tanzania at Mwanza
Date of judgment:	21 May 1965
Case Number:	587/1964
Before:	Biron J
Sourced by:	LawAfrica

[1] *Road traffic – Defective vehicle – Owner charged with permitting vehicle to be driven whilst defective – Mens rea – Defence that owner had taken all reasonable precautions – Meaning of word “permit” – Whether liability for permitting defective vehicle absolute – Whether law in respect of permitting defective vehicle different in Tanzania from that in England and Kenya – Traffic Ordinance (Cap. 168), s. 43 and s. 70 (T.) – Traffic Rules, r. 30(1) (K.) and r. 69 (T.).*

Editor’s Summary

The appellant company was convicted on two counts; of permitting a motor vehicle to be used on the road with defective springs and with permitting the said vehicle to be used with an inefficient braking system. The appellant company ran a fleet of buses. After one of the vehicles was involved in an accident it was discovered to be defective in that the brakes were not in proper working order and the springs were defective. The company’s defence that the defects were caused by the accident was rejected by the court, which found the vehicle to have been defective before the accident. Evidence was given by the company’s mechanic, whose duty it was to maintain and check the company’s vehicles, that he had personally checked the vehicle before it set out on the journey in the course of which it met with the accident and it was then in perfectly good condition. This evidence was not rejected by the court but even so the company was nevertheless convicted, the court ruling that the liability for permitting was absolute.

Held – allowing the appeal, that the law in respect of permitting the use of a defective vehicle in Tanzania is no different from that in England or in Kenya. The liability of an owner is not absolute. Although there is no requirement for an owner to have express knowledge of such defect to be held liable, he will be liable if he had constructive knowledge, that is if he either wilfully shut his eyes or that knowledge can be implied from the act of permitting, or that he did not take reasonable steps or proper precautions to prevent such user.

Per Curiam: It may well be argued that in order to secure that the maximum precautions are taken to ensure that vehicles on the road are maintained in good condition in accordance with regulations, the liability of an owner should be absolute. This could be achieved by following the advice of Lord Goddard, C.J., in *Hutchings v. Giles*, that: “In view of the decision in *James & Son v. Smee* the police would be advised in circumstances of this sort to avoid, wherever possible, the use of this much-canvassed word ‘permit’ and, where a vehicle is being driven by a servant on the master’s business to charge the master with the substantive offence of using the vehicle.” *Gulu K. Nanji v. R.* not followed.

Appeal allowed.

Cases referred to in judgment:

- (1) *Gulu K. Nanji v. R.*, [1962] E.A. 482 (T.).
- (2) *James & Son v. Smee*, [1954] 3 All E.R. 273.
- (3) *Hutchings v. Giles* (1955), Crim. Law Rev. 784.
- (4) *John Ngoli v. R.*, [1961] E.A. 575 (K.).
- (5) *Alimohamed Osman v. R.* (1952), 1 T.L.R. (R.) 391.
- (6) *Remat Nanji Ahmed v. R.*, [1959] E.A. 804 (T.).

- (7) *Somerset v. Wade*, [1894] 1 Q.B. 574.
- (8) *Alli Mzee v. R.*, [1960] E.A. 404.
- (9) *Evans v. Dell*, [1937] 1 All E.R. 349.
- (10) *Goldsmith v. Deakin* (1933), T.L.R. 73.
- (11) *Churchill v. Norris*; *Maidment v. Same*, [1938] L.T. 255.
- (12) *Goodbarne v. Buck*; [1940] 1 K.B. 771.
- (13) *McLeod (or Houston) v. Buchanan*, [1940] 2 All E.R. 179.
- (14) *Allen v. Whitehead*, [1930] 1 K.B. 211.
- (15) *Mousell Bros. v. London and North Western Rly.*, [1917] 2 K.B. 836.

Judgment

Biron J: The appellant company (hereinafter referred to as “the company”) was convicted in the person of its manager on two counts, of permitting a motor vehicle to be used on the road with defective springs, contrary to rr. 30(1) (K.) and 69 of the Traffic Rules, and of permitting the same vehicle to be used on the road with an inefficient braking system, contrary to ss. 43 and 70 of the Traffic Ordinance, and the manager was fined respectively Shs. 70/- and Shs. 100/- with imprisonment for one month in default in each case. The company is now appealing.

It was established in evidence not disputed that the vehicle concerned after it had overturned on the road, was found to be defective, which defects formed the subject matter of the two charges. The prosecution’s case was that the vehicle was defective before the accident, that the defects were responsible for the accident in that the vehicles on proceeding uphill could not hold the road, slipped backwards, went into the side of the road and overturned. The company’s defence was to the effect that the vehicle on leaving the garage was in perfect order, having been checked by a responsible mechanic, and the defects, the subject matter of the charges, were caused by, and as a result of, the accident. Evidence was given on behalf of the prosecution by a witness who described himself as an inspector of vehicles, to the effect that the defects were not caused by the accident but were there before the accident occurred. This evidence was disputed by the company’s mechanic, who claimed 25 years’ experience as a mechanic. He stated that he personally checked the vehicle before it went out on the journey in the course of which the accident occurred and it was in good order. In his judgment the learned magistrate stated, inter alia:

“Indeed it appears to this court that the accident had been due to mechanical defects. The accused called one of his experienced mechanics Said Ahmed (DW2) to prove that the vehicle was in a perfect mechanical order when it left for Bukoba. Proof of this fact does not help the accused case at all because this vehicle had driven for over 75 miles carrying passengers, and it is the opinion of Ahmed – and of course common sense too – that a vehicle which had driven for such a long distance is liable to suffer defects on the way. In other words, it is possible that vehicle became defective after it had left the accused garage. The liability of the accused for such mechanical defects is absolute. It does not matter whether the accused knew it was defective or not. The important thing is that the vehicle was defective when it met with an accident. For this reason – absolute liability – the accused is found guilty on both counts as charged and is therefore convicted.”

In its Petition of Appeal the company asserts that:

- “1. The learned resident magistrate erred in finding the appellant as the owner of the vehicle, guilty of the offence of permitting the vehicle to be driven with defective springs and inefficient braking system.

2. The learned resident magistrate erred in convicting the appellant while accepting that the vehicle left the appellant's garage in good mechanical condition and might have become defective after running for a few miles.
3. The learned resident magistrate ought to have concluded that the appellant as the owner of the vehicle were not liable for the defects which developed later on and erred in concluding that the appellant's liability was absolute.
4. The learned resident magistrate ought to have concluded that the appellant company had no power or control over the vehicle's mechanical condition once it had left the garage in good condition and which fact was accepted as true.
5. That the learned resident magistrate ought to have given the benefit of doubt to the appellant as he believed that the vehicle might have become defective on the way."

As the learned magistrate did not find that the vehicle was in a defective condition when it left the garage, but conceded the possibility that it became defective en route, as agreed by the learned State Attorney, the conviction stands or falls on whether the learned magistrate was right in ruling, as he did, that the company's liability was absolute.

The determination of this issue as to an owner's liability in permitting a vehicle to be used in a defective condition, is not without difficulty. In fact, there are at present before this court two conflicting decisions on the point; in this instant case where it was held that the liability was absolute, and in Criminal Revision Nos. 183 and 185 of 1964, the lower court held that the liability was not absolute, that it was a good defence on the part of the owner that he took all reasonable precautions to ensure that the vehicle was in good order.

In ruling in this instant case that the liability of an owner in "permitting" was absolute, the learned magistrate has not quoted or cited any authority. Learned State Attorney in upholding the learned magistrate's ruling, bases his authority on the judgment of Weston, J., in *Gulu K. Nanji v. R.* (1). The facts of that case, as taken from the judgment are ([1962] E.A. (T.) at p. 483):

"The appellant owned three vehicles. The one mentioned in the charges was due to go on safari on the morning of February 22, 1962, at about 9 o'clock. It was not at that time roadworthy, and the appellant was so informed by the driver. The appellant did not send the vehicle to a garage because he was in a hurry. He directed his driver to make the necessary repair, and this the driver did, assisted by a turnboy. The vehicle eventually set out on the road at about 1 o'clock in the afternoon, carrying a number of passengers and driven by the driver who had repaired it. Shortly after this the vehicle was involved in an accident. It had to stop on a hill to let another vehicle pass, whereupon it rolled back and overturned. The driver was killed. The wreck was inspected by a vehicle inspector the next day and was found to have defective brakes and steering."

The learned judge went on to say:

"In passing judgment the learned magistrate said this:

There is no question at all of 'mens rea' in the three counts brought against the accused. To 'permit' has been held in an English case to mean inter alia 'failure to take proper steps to prevent'. That reference escapes me at the moment. The accused attempted to delegate his responsibilities to others who on their own evidence had no skill whatever.

Counsel for the appellant, contends that in this passage the learned magistrate misdirected himself in point of law. Mens rea in the sense that the appellant knew the brakes and steering were defective had to be established before he could be properly convicted as charged. Learned counsel cited authorities which I must now consider.”

The judgment then continues, and I am afraid that I must quote in extenso, as to attempt to paraphrase might, I apprehend, do less than justice, and to cull from context could offend even more.

“In *James & Son v. Sme* (2) Parker, J., as he then was, delivering the judgment of the majority, Goddard, L.C.J., Cassels, Lynskey and Parker, JJ., with Slade, J., dissenting, held on appeal – and I quote from the headnote: –

‘The appellants could not be guilty of “permitting” a user in contravention of the regulation (i.e., the offence charged) unless it were proved that some person, for whose criminal act they were responsible, “permitted”, as opposed to “committed”, the user in contravention of the regulation; that, as there was no evidence that the appellants had knowledge of any facts constituting user in contravention of the regulation, they did not permit such user, and accordingly the conviction should be quashed.’

In the later case of *Hutchings v. Giles* (3) a Queen’s Bench Divisional Court consisting of Lord Goddard, C.J., and Ormerod and Glyn-Jones, JJ., heard an appeal against conviction on facts which have remarkable similarity to those in this case, and it was held that:

‘Although if N. had been charged with “using” the vehicle in its defective condition he would have been properly convicted, the charge of “permitting” this use had not been made out as, since the decision in *James & Son v. Sme* (2), by which the court considered itself bound, it was necessary, in order to substantiate the charge of “permitting the use” for the prosecution to prove knowledge of the defects and in the present case the justices had found only that he should have had knowledge of the defects.’

The Lord Chief Justice indeed said that:

‘In view of the decision in *James & Son v. Sme* (2) the police would be well advised in circumstances of this sort to avoid, wherever possible, the use of this much-canvassed word “permit” and, where a vehicle is being driven by a servant on the master’s business to charge the master with the substantive offence of using the vehicle.’

Nearer home, Her Majesty’s Supreme Court of Kenya, Sir Ronald Sinclair, C.J. (as he then was) and Rudd, J., in *John Ngoli v. R.* (4) applied the principle in *Sme*’s case, when called upon to interpret the legislation of Kenya corresponding to the provisions of Tanganyika law which I have before me.

Now these are formidable authorities indeed, and would at first sight appear to cast doubt on the correctness of the decisions of this court in *Alimohamed Osman v. R.* (5) and *Remat Nanji Ahmed v. R.* (6), but if the law with which the English and Kenyan Courts were concerned is examined, it becomes clear, in my view, what the explanation is for these apparently divergent decisions.

The law which the English courts were called upon to interpret is contained in reg. 101 of the Motor Vehicles (Construction and Use) Regulations, 1951, the material words in which read as follows:

‘If any person permits to be used on any road a motor vehicle in contravention of or fails to comply with any of the preceding regulations contained in Part III of these regulations he shall for each offence be liable to a fine not exceeding £20.’

The Kenyan law follows the English form. Thus s. 103 (5) of the Kenya Traffic Ordinance, 1953, reads:

‘Any person who permits the use of any vehicle in respect of which any prohibition or restriction is in force other than in conformity with any conditions or for such purpose as may have been specified shall be guilty of an offence and shall be liable upon conviction to a fine not exceeding shillings four thousand or to imprisonment for a period not exceeding twelve months or to both such fine and imprisonment.’

and s. 24 (a) of the Transport Licensing Ordinance of Kenya reads as follows:

‘Any person who drives or uses a goods vehicle, motor vehicle or ship in contravention of any of the provisions of this Ordinance, or being the owner of such vehicle or ship permits it to be so used, and any driver or other person in charge of any vehicle or ship, in respect of which any class of licence has been granted under this Ordinance, who drives or uses such vehicle or ship in contravention of any condition of such licence, or being the owner of such vehicle or ship permits it to be so used, shall be guilty of an offence against this Ordinance.’

The relevant words in s. 43 of the Traffic Ordinance under which the appellant here was charged read as follows:

‘No person shall permit a motor vehicle to be used on a road unless the following conditions are complied with’

and then the conditions are set out.

Speaking of the provision of law before the English court, Parker, J., said this ([1954] 3 All E.R. at p. 278):

‘The appellants were, however, charged with permitting the use in contravention of reg. 75 which, in our opinion, at once imports a state of mind. The difference in this respect was pointed out as long ago as 1894 by Collins, J. in *Somerset v. Wade* (7) where he distinguished an absolute prohibition against a licensee selling to a drunken person and a prohibition against permitting drunkenness. In the latter case he must shown to be have known that the customer was drunk before he can be convicted.’

and with these words I most respectfully agree. But as I read s. 43 of the Traffic Ordinance they do not in my judgment apply to the interpretation of that provision; and in particular the word “permit” in the context does not “at once import a state of mind”. I think that the effect of the words “unless the following conditions are complied with” restricts the meaning of the word “permit” to the act or fact of permitting only, and that the subjective mental element is excluded by these words. In short, in my judgment, the words “unless the following conditions are complied with” estop, if I may so put it, the appellant from pleading that he did not know the conditions were not complied with. The provision of Tanganyika law before me I hold constitutes an absolute prohibition against the act of permitting the user of a motor vehicle which in fact does not comply with the conditions mentioned.

For these reasons I think learned Crown Counsel’s submission that *Alimohamed Osman’s* case (5), and *Remat Nanji Ahmed’s* case (6), are good

authority for the learned magistrate's statement of the law which I have quoted is valid.

It follows that Mr. Grimble's third ground of appeal, that, and I quote:

'On the weight of the evidence the prosecution failed to prove that the appellant knew that the vehicle was defective as charged when it commenced its journey and that the appellant had not taken all reasonable precautions to see that the vehicle was in a roadworthy condition'

does not call for consideration as going to the validity of the appellant's conviction on the first and second counts of the charge sheet."

If the learned judge in upholding the decision of the magistrate that the accused was liable, is going no further than, to quote the magistrate, because he "attempted to delegate his responsibilities to others who on their own evidence had no skill whatever", that, again quoting the magistrate "to 'permit' has been held in an English case to mean inter alia, 'failure to take proper steps to prevent'", with respect, I fully agree. If, however, as submitted by learned State Attorney, the learned judge is going much further and laying down the law that the liability is absolute, that it is no defence for an owner to establish that he had taken all reasonable precautions to ensure that the vehicle was in proper condition, with even greater respect, I must express my disagreement with such obiter ruling and also confess my failure to comprehend the interpretation placed on s. 43 of the Traffic Ordinance, distinguishing it from the corresponding provisions under English and Kenyan law, on which the statement of law is based.

Before dealing with this question of interpretation, I must revert to the learned judge's comment after referring to the English and Kenya cases, that these authorities:

"... at first sight appear to cast doubt on the correctness of the decisions of this court in *Alimohamed Osman v. R.* (5) and *Remat Nanji Ahmed v. R.* (6), but if the law with which the English and Kenyan courts were concerned is examined, it becomes clear, in my view, what the explanation is for these apparently divergent decisions."

With respect, the decision in neither of these two cases is different or diverges from English law in respect of "permitting" nor do they constitute authority for the proposition that the liability for "permitting" is absolute.

In *Alimohamed Osman's* case (5), Abernethy, J., found, and I quote from his judgment ((1952), 1 T.L.R. at p. 393):

"From the time the vehicle was hired by the Public Works Department until the time the tyre burst, resulting in this case, the owner took no steps whatsoever to see that the driver was maintaining the lorry in good condition."

Obviously, had the owner taken such proper steps he would have escaped liability. The magistrate, in the criminal revisional cases referred to above, expressly relied on *Alimohamed Osman's* case in acquitting the accused company of "permitting", stating:

"In my opinion the owners are only expected to make sure the motor vehicles leave the premises in good condition. What happens on the way back home cannot be expected to be on the knowledge of the owner. The defence has produced evidence that the motor vehicle was checked before it left for safari and in fact that is the procedure. In this case the case of *Alimohamed Osman v. R.* (5) has been quoted. In that case the honourable judge defined the word 'permit' at p. 392 (at the bottom) and he said 'to

permit' in its ordinary sense means 'to allow'. When a person is in a position to stop something being done and does not do so he must be held to allow it to be done. In that case the owner was charged with permitting a motor vehicle to be driven with defective tyres and there was evidence that the owner did not maintain the tyres for the three months he left the motor vehicle in the hands of the driver. This case is slightly different because the buses are sent out daily and it has been said they are checked before leaving."

Whilst I am not in full agreement with the finding as a whole of the magistrate, he certainly does not regard *Alimohamed Osman's* case (5) as an authority for the proposition that liability for "permitting" is absolute, but rather the contrary. Likewise, Murphy, J., in commenting on *Alimohamed Osman's* case (5) in *Alli Mzee v. R.* (8), said ([1960] E.A. at p. 405):

"Could then the appellant be said to have permitted something of which he had no knowledge? There are a number of reported decisions on the meaning and effect of the word 'permit' in a statute, some of which are at first sight not easy to reconcile. In *Evans v. Dell* (9) it was held that the owner of a motor coach who had been charged under the Road Traffic Act, 1930, with permitting it to be used as a stage carriage had been properly acquitted since he was unaware of the use to which it was being put. This case is referred to by Abernethy, J., in *Alimohamed Osman v. R.* (5), where he quotes Swift, J., as having said that he could not see how anybody could be charged with permitting an offence to be done unless he had some knowledge that the offence was done or was about to be done. With respect, this observation of Swift, J. (with which Abernethy, J., disagreed) is not to be found in the report of *Evans v. Dell* (9), in which no judgment was delivered by Swift, J. The observation appears to have been taken from a lay report quoted in Mahaffy and Dodson's Road Traffic Acts and Orders, 1939 Supplement, at p. 7, and may have been made while hearing arguments. The reasons for the decision in *Evans v. Dell* (9), are given in the judgment of Lord Hewart, L.C.J., and that judgment leaves open the question of what would have been the position if it had been shown that the owner of the vehicle ought to have known (irrespective of whether he in fact knew or not) the purpose for which the vehicle was to be used. This is the question which was considered by Abernethy, J., in *Alimohamed Osman v. R.* (5), where it was held that the owner of a vehicle who left it entirely to his African driver to look after the vehicle took the risk that the driver might not comply with the requirements of the traffic laws and if in these circumstances the driver drove the vehicle with defective tyres the owner had 'permitted' him to do so. This decision, with which I respectfully agree, is not inconsistent with *Evans v. Dell* (9), and is in accordance with decisions in other English cases to which Abernethy, J., refers in his judgment."

With regard to the other case cited by the learned judge, that of *Remat Nanji Ahmed v. R.* (6) in that case I held that express knowledge on the part of an owner was not a pre-requisite to render him liable for "causing" or "permitting" a vehicle to be driven in a defective condition. That case goes no further than, as explicitly stated in the headnote, that:

- "(i) it is not necessary for the prosecution to prove that the owner of a vehicle which is being driven by an employee in the course of his duties whilst in a defective condition has express knowledge of the condition of the vehicle at the material time.

- (ii) it is in such a case immaterial whether the charge is for 'permitting' or 'causing' as the owner is equally liable for either offence."

That is a far cry from holding that liability is absolute.

In his judgment in Nanji's case, after interpreting the section as he did, Weston, J., went on to say:

"For these reasons I think learned Crown Counsel's submission that *Alimohamed Osman's* case (5) and *Remat Nanji Ahmed's* case (6) are good authority for the learned magistrate's statement of the law which I have quoted is valid."

With respect, I fully agree, but as demonstrated, in none of these three cases was it held that the liability for "permitting" is absolute. Nor under English law is express knowledge necessary to render an owner liable for "permitting".

The English authorities are to the effect that an owner will be liable even if he had no knowledge of the offence if, as held in *James & Son v. Smee* (2), the very case cited by Weston, J., in *Nanji's* case (1), the relevant part of the head-note to which reads:

"... knowledge, in this connection includes the state of mind of a man who shuts his eyes to the obvious or allows his servant to do something in circumstances where a contravention is likely not caring whether a contravention takes place or not."

And as in *Evans v. Dell* (9), where Hewart, L.C.J., commenting on the judgment of Avery, J., in *Goldsmith v. Deakin* (10), said ((1933) T.L.R. at p. 353):

"That judgment has been more than once considered in this court, and, when one reads it as a whole, not taking out one particular passage and dwelling upon it, but reading all the judgment, it means, I think, that, in circumstances in which the owner of the vehicle is put upon inquiry, if he refrains from making the inquiry, and an offence is committed, the fair inference may be that he permitted the offence to be committed."

Also, as stated by the magistrate in *Gulu Nanji's* case (1) that "to 'permit' has been held in an English case to mean inter alia, 'failure to take proper steps to prevent'". This statement, the source of which was not given by the magistrate, is a dictum of Humphreys, J., in *Churchill v. Norris; Maidment v. Same* (11), the full statement in its context reads:

"I agree. I observe that the contention made on behalf of the appellant, Maidment, in the court below is put in this way: 'The appellant having sworn on oath that he had no knowledge of any circumstances calling for inquiry in this case, and that he had nothing to put him on his guard, had not permitted the use of the vehicle ... contrary to the said regulations.' On that contention, the justices have said that in their opinion the appellant, Maidment, permitted the use of the vehicle, and they add this: 'In coming to this opinion we had regard to the fact that the appellant had made no arrangements for weighing loads if at the time of the acceptance weigh-bridges were closed.' These were the facts of this case. The driver having in fact been instructed to go to a place in the north of London to collect a load of timber, went there, and arrived at a time when there were no weigh-bridges open. He proceeded to take the unweighed load of timber on his lorry, and went on that night to Chelsea, that is, along a public road. As it now turns out, the driver was at that time offending against the regulation because the lorry was overloaded. The next morning the driver left for Dorset, and by the time he reached Somerset no attempt had been

made to weigh his load. There is no finding and no suggestion that the owner of the lorry had forbidden his driver to take a load of timber on the road unless it had been weighed. There is no finding that he had directed his servant that, if the weigh-bridges were closed, he was to wait until they were open in order that the timber might be weighed before it was taken on the road. I agree with the justices that the absence of any direction as to what was to happen, if at the time of loading the weigh-bridges were closed, indicates sufficient carelessness on the part of the appellant, Maidment, to justify the justices in holding that he had permitted the offence to be committed within the meaning of the cases cited to the court, in the course of which cases it was made clear that the word 'permit' may mean no more than a failure to take proper steps to prevent."

It is also pertinent to quote further from the judgment of Murphy, J., in the case cited above (*ibid.*, at p. 406):

"One must, I think, discard the idea that this is a case of absolute liability. The use of the word 'permits' indicates that there must be a *mens rea*, but the question to be decided is what attitude of mind constitutes a *mens rea* in this context. I think that this attitude of mind can best be described as an ignoring of responsibility. It seems to me that two principles emerge from the decided cases. First, the person charged must have been in a position to forbid the act which he is said to have permitted. This was decided in *Goodbarne v. Buck* (12). Secondly, and more important, there must be a responsibility to forbid the act; and if this responsibility exists, the person upon whom it lies cannot escape liability by pleading lack of knowledge that the act was being committed, unless he can show that even by taking all reasonable precautions it was impossible for him to acquire this knowledge. This would appear to be the principle which has been applied in those cases where owners of vehicles have been held to have permitted acts done by their driver."

To return to the interpretation of the section by the learned judge, which I find novel and am unable to comprehend, novelty in itself is not necessarily fatal, and my lack of comprehension may well be subjective. I feel on much firmer ground in noting a complete absence of authority and in demonstrating that there is authority, the very highest, that the interpretation is misconceived.

In *McLeod (or Houston) v. Buchanan* (13), the facts as taken from the headnote, were that:

"... A woman whose son was fatally injured as a result of a motor accident obtained judgment for damages and costs against the negligent driver of the vehicle, but failed to recover anything under the judgment. She thereupon brought an action to recover the damages and costs from the owner of the vehicle, alleging that he was in breach of his duty under the Road Traffic Act, 1930, s. 35, in permitting the driver to use the vehicle when it was not insured against third-party risks, in the sense that it was not insured for private purposes when in fact it was being used for a private purpose, but was insured for commercial use only. There was no evidence that the owner knew that the driver was using the vehicle for a private purpose, or that he gave him express permission so to use it: ..."

The plaintiff, having failed to recover from the driver of the vehicle, sued the owner. Although it was a civil case, the liability of the owner depended on whether or not he was in breach of a statutory duty under the Road Traffic Act, 1930, s. 35. On the case coming before the House of Lords, it was held that the owner was in breach of the statutory duty imposed by the section and was therefore liable in damages. The vehicle in question at the material time

was being used by the owner's brother in the circumstances as set out in the judgment of Lord Russell of Killowen (*ibid.*, at p. 184) as follows:

"My Lords, a perusal and consideration of the evidence in the case establish as against the respondent the following facts – (i) that from about June, 1932, down to the purchase of the Ford van, the farm vehicle (i.e., the vehicle which formed part of the farm assets, and which belonged to the respondent as owner of the farm) was the Humber car; (ii) that the insurance covered its user for both business and private purposes; (iii) that it was, to the knowledge of the respondent, used by James Buchanan for both business and private purposes, as well after as before Mrs. James Buchanan had bought her own Standard car; (iv) that the Ford van was bought to take the place of the Humber car, which had broken down; (v) that the insurance company was asked to cover temporarily, and did cover temporarily, the van in substitution for the Humber car under the existing policy; (vi) that the only proposed alteration in the new insurance of which James Buchanan was specifically informed by the respondent was that the new policy was to be in his name, and not, as was the case with the Humber policy, in the name of James Buchanan; and (vii) that the respondent's firm on August 3, 1933, forwarded to James Buchanan a certificate of insurance which had been sent to them by the insurance company, and which stated, *inter alia*, that the insurance was limited to the use of the vehicle 'in connection with the policy holder's business only' . . ."

Lord Russell went on to say:

"The question in this case is whether the respondent permitted James Buchanan to use the Ford van on a road without there being in force in relation to the user of the Ford van by James Buchanan the requisite policy of insurance in respect of third party risks. But for the forwarding of the certificate to James Buchanan, the answer must, in my opinion, be clearly 'Yes'. On the facts of this case, James Buchanan was entitled to assume, unless told otherwise, that the new farm vehicle took the place of, and was substituted for, the old farm vehicle for all purposes. In other words, he was entitled to assume that the permission to use the farm vehicle for private purposes continued, unless and until withdrawn. Indeed, the isolated position of the farm, four or five miles distant from the nearest village, and the meagre public means of transport available, made such permission almost, if not absolutely, a necessity for whoever acted as resident manager for the respondent. If this was the case, as, in my opinion, it was, then the respondent must, or ought to, have known that, unless James Buchanan was told that the Ford van must not be used for private purposes, he would continue the old Humber practice, and would use the Ford van for these purposes. In those circumstances, if and when James Buchanan used the Ford van for private purposes, the respondent would be permitting that user within the meaning of the Road Traffic Act, 1930, s. 35 (1).

The question then remains whether the sending of the certificate can operate as a withdrawal by the respondent of the old permission, or a prohibition by the respondent of the user of the Ford van for non-business purposes. In my opinion, it cannot operate as either. . ."

Section 35 (1) of the Road Traffic Act, 1930, under which the case was decided, reads:

"Subject to the provisions of this Part of this Act, it shall not be lawful for any person to use, or to cause or permit any other person to use, a motor vehicle on a road unless there is in force in relation to the user of

the vehicle by that person or that other person, as the case may be, such a policy of insurance or such a security in respect of third party risks as complies with the requirements of this Part of this Act.”

The relevant part of s. 43 of the Traffic Ordinance reads:

“No person shall cause or permit a motor vehicle or trailer to be used on a road or shall drive or have charge of a motor vehicle or trailer when so used unless the following conditions are complied with: —”.

It will be noted that the wording, except for the opening words “no person shall cause or permit, etc.” is similar to that of s. 35 (1) of the Road Traffic Act, 1930. It cannot be argued that these opening words in any way affect the interpretation of the sections. Learned State Attorney submitted that the learned judge was relying on the use of the word “unless” expressly stating:

“I think that the effect of the words ‘unless the following conditions are complied with’ restricts the meaning of the word ‘permit’ to the act or fact of permitting only and that the subjective mental element is excluded by these words.”

Although a similar expression “unless there is in force, etc.” appears in the English Act, none of the law Lords attempted to interpret it as has done the learned judge.

I have already quoted from the judgment of Lord Russell. Lord Wright in his judgment stated (*ibid.*, at p. 187):

“To ‘permit’ is a looser and vaguer term. It may denote an express permission, general or particular, as distinguished from a mandate. The other person is not told to use the vehicle in the particular way, but he is told that he may do so if he desires. However, the word also includes cases in which permission is merely inferred. If the other person is given the control of the vehicle permission may be inferred if the vehicle is left at the other person’s disposal in such circumstances as to carry with it a reasonable implication of a discretion or liberty to use it in the manner in which it was used. In order to prove permission, it is not necessary to show knowledge of similar user in the past, or actual notice that the vehicle might be, or was likely to be, so used, or that the accused was guilty of a reckless disregard of the probabilities of the case, or a wilful closing of his eyes. He may not have thought at all of his duties under the section. The Lord President in his judgment stated that both parties before the First Division expressly accepted as the test for the present case:

. . . did the defender know or ought he to have known that the van was being or was likely to be used by his brother for his own private purposes?

This, so far as it goes, is a compendious and practical way of stating the crucial question. If the answer is in the affirmative, a case of permission is made out.”

It is not, I consider, necessary to cite any further cases on third-party insurance. In so far as I am aware there is not a single English case wherein an attempt has been made to distinguish between the liability for “permitting” in third party insurance cases and the liability for “permitting” the user of defective vehicles on account of the difference in the wording of the respective legislative enactments.

Learned State Attorney in canvassing that liability for “permitting” is absolute laid great stress on the dictum of Lord Hewart, C.J., in *Allen v. Whitehead* (14) ([1930] 1 K.B., at p. 220) that:

“The principle seems to me to be that which was explained, for example, in *Mousell Brothers v. London and North-Western Rly.* (15), where Atkin, J. (as he then was) said:

‘I think that the authorities cited by my Lord make it plain that while prima facie a principal is not to be made criminally responsible for the acts of his servants, yet the Legislature may prohibit an act or enforce a duty in such words as to make the prohibition or the duty absolute; in which case the principal is liable if the act is in fact done by his servants. To ascertain whether a particular Act of Parliament has that effect or not regard must be had to the object of the statute, the words used, the nature of the duty laid down, the person upon whom it is imposed, the person by whom it would in ordinary circumstances be performed, and the person upon whom the penalty is imposed’.”

He, learned State Attorney, submitted that in order to remedy the mischief of vehicles being used on the road in a defective condition the liability of the owner should be absolute. It may also be argued, as indeed it has been, that it is highly anomalous that the liability of an owner in respect of a defective vehicle on the road should be determined by the manner in which the charge is laid, that there should be a difference in the nature of the liability for “using” and for “permitting”. The answer to both these submissions is to be found in the judgment of Parker, J., in *James & Son, Ltd. v. Smee* (2) ([1954] 3 All E.R., at p. 279):

“In our view, therefore, this appeal should be allowed albeit the appellants would have had no answer if charged with using the vehicles in contravention of the regulations. Normally, we should be very loath to allow the appeal on the ground that the appellants had been wrongly charged, but we have no such feelings in the present case since in our view on the facts it cannot be suggested that they were in any way to blame, nor is it a case where it could be said that a conviction and fine would make them more alert to see that the law was observed. Where legislation, as here, throws a wide net it is important that only those should be charged who either deserve punishment or in whose case it can be said that punishment would tend to induce them to keep themselves and their organisation up to the mark.”

To recapitulate, I do not consider that the law in respect of “permitting” the use of a defective vehicle in this country is any different from the law in England or in Kenya. The liability of an owner is not absolute. Nor is there any requirement either in England or in this country that for an owner to be liable he must have express knowledge of the defect. He will be held liable if he had constructive knowledge, that is, if he either wilfully shut his eyes, or that knowledge can be implied from the act of “permitting”, or that he did not take reasonable steps or proper precautions to prevent such user.

In this instant case, as already indicated, the conviction stands or falls on whether such liability is absolute. In view of my finding that liability is not absolute, the conviction cannot be sustained. The appeal is accordingly allowed and the conviction is quashed. The fine if paid is to be refunded to the company.

Earlier in this judgment I indicated that I did not wholly agree with the magistrate in the revisional cases referred to. To my mind, the proprietor of a fleet of buses cannot escape liability for “permitting” only by ensuring that his vehicles leave the garage in good condition, notwithstanding that they continue to be driven on the road after they become defective. He must take the further precautions, by prohibiting his drivers from continuing to drive a vehicle on its becoming defective so as to contravene any regulation and providing for such

contingency, to ensure to the best of his ability, that his vehicles not only leave the garage in good condition but are not driven on the road unless in good condition.

It may well be argued that in order to secure that the maximum precautions are taken to ensure that vehicles on the road are maintained in good condition in accordance with regulations, the liability of an owner should be absolute. This could be achieved by following the advice of Lord Goddard, C.J., in *Hutchings v. Giles* (3) that:

“In view of the decision in *James & Son v. Sme* (2) the police would be well advised in circumstances of this sort to avoid, wherever possible, the use of this much-canvassed word ‘permit’ and, where a vehicle is being driven by a servant on the master’s business to charge the master with the substantive offence of using the vehicle.”

Appeal allowed.

For the appellant:

N. K. Lanman, Mwanza

For the respondent:

The Attorney-General, Tanzania

K. R. K. Tampi (State Attorney, Tanzania)

Eliakanah Omuchilo v Ayub Machiwa [1966] 1 EA 229 (HCK)

Division:	High Court of Kenya at Kisumu
Date of judgment:	4 March 1966
Case Number:	5/1965
Before:	Harris J
Sourced by:	LawAfrica

[1] *Practice – Service of summons – Defendant not found at his ordinary residence or place of business – Summons affixed to outer door of house without any further attempt to serve defendant or his agent personally – Whether service – valid – Civil Procedure (Revised) Rules, 1948, O. 5, r. 14 (K).*

Editor’s Summary

The court process server accompanied by an agent of the plaintiff visited a house in which the defendant ordinarily resided to serve a summons on him but the defendant could not be found there. The process server then affixed the copy of the summons on the outer door of the house and swore a brief affidavit of service to that effect. Subsequently judgment was entered ex parte in default of appearance and after

formal proof and distraint in execution the defendant applied to set aside the judgment.

Held –

- (i) before a process server can validly effect service by affixing a copy of the summons to the premises he must, by virtue of O. 5, r. 14 of the Civil Procedure (Revised) Rules, 1948, first use “all due and reasonable diligence” to find the defendant or any of the persons mentioned in O. 5, r. 9, r. 11 and r. 12, and it is only when, after using such diligence, none of them can be found, that he can affix a copy of the summons on the premises full particulars of which should be given;
- (ii) the service upon the defendant was wholly ineffective as the process server had not used “all due and reasonable diligence” to find the defendant or the persons mentioned in O. 5, r. 9, r. 11 and r. 12; and accordingly the judgment should be set aside without terms being imposed on the defendant.

Appeal allowed.

Case referred to in judgment:

(1) *Erukana Kavuma v. Mehta*, [1960] E.A. 305 (U.).

Judgment

Harris J: This is an application by the defendant, brought under rr. 10 and 24 of O. IX of the Civil Procedure (Revised) Rules, 1948, to set aside the judgment in favour of the plaintiff which was passed ex parte in default of appearance and after formal proof by this court on May 25, 1965, and the decree consequent thereon.

The judgment and decree direct payment by the defendant to the plaintiff of the sum of Shs. 10,500/-, together with interest and costs, claimed in a plaint filed on January 15, 1965, being Shs. 4,500/- the purchase price of some land alleged to have been sold by the defendant to the plaintiff in the year 1948 and Shs. 6,000/- by way of general damages for the deprivation of the plaintiff of the use of the said land.

The application is based primarily upon an allegation that the defendant was not duly served with either the plaint or the summons issued thereon by the Registry as required by O. V of the Rules, and turns principally upon the averments in the affidavit of service sworn by the court process-server relating to the service of these documents purported to have been effected by him. The material averments are as follows:

- “(2) On the 17th day of March, 1965, I received a summons issued by the Supreme Court of Kisumu in Suit No. 5 of 1965, in the said Court, dated 18th day of January, 1965 for service on Ayub Machiwa.
- (3) One Mr. Enock Mwando accompanied me to the defendant’s house and there pointed out to me a house in which the said Ayub Machiwa ordinarily resides, and there on the 1st day of April, 1965 at about 10 a.m. o’clock in the forenoon I did not find the said Ayub Machiwa. I therefore posted copies on the outer-door of his house.”

This affidavit was on a printed form similar to that set out as form No. 8 of Appendix A to the Rules and authorised by r. 3 of O. XLVII. This form directs that cl. 3 of the affidavit should be completed by entering fully and exactly the manner in which the process was served, with special reference to rr. 14 and 16 of O. V, and the question is as to whether sufficient details were given to enable the court, now that the matter has been challenged, to hold that service was effected in accordance with the requirements of the rules.

Rule 9 of O. V provides that service of a summons shall, wherever it is practicable, be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on such agent shall be sufficient; r. 11, which applies in the case of a suit to obtain relief respecting immovable property in which service cannot be made on the defendant in person, permits service to be effected on inter alios the agent of the defendant in charge of the property; and r. 12 provides that, where the defendant cannot be found, service may be made on any adult member of his family who is residing with him.

Rule 7 of the same Order requires that service of a summons shall be made by delivering or tendering a duplicate thereof, and r. 14 declares that where the serving officer “after using all due and reasonable diligence, cannot find the defendant, or any person on whom service can be made”, he shall affix a copy of the summons on the outer door or some other conspicuous part of “the house in which the defendant

ordinarily resides or carries on business or personally works for gain”.

In the present case the serving officer sought to serve the defendant at his residence, to which he went at ten o'clock in the morning accompanied by another person who was able to point out the residence, and, not finding the defendant there, the officer proceeded without more ado to post one or more copies of the summons on the outer door of the premises in purported pursuance, it would appear of r. 14.

In my opinion this service was clearly ineffective. On the facts of the case the persons who, if the defendant could not be found, might have been validly served included any agent of the defendant empowered to accept service (r. 9), any agent of the defendant in charge of the suit premises (r. 11), or any adult member of his family residing with him (r. 12). Therefore before the serving officer could validly effect service by affixing a copy of the summons to the premises he must, by virtue of r. 14, first have used "all due and reasonable diligence" to find the defendant or any one of these other persons, and it is only when, after using such diligence, none of them could be found, that he could proceed to affix a copy of the summons to the premises. The affidavit does not state or even suggest that the officer concerned himself in any way with looking for any person, except the defendant personally, upon whom to effect service.

Although at the conclusion of counsel's argument I felt little doubt but that the application should succeed, I reserved my decision in order that, in view of the increasing frequency with which instances of defective service of court processes are being brought to light, I might set out shortly in a considered judgment the practical requirements in the matter. The procedure of entering judgment in default of appearance, whether by a judge pursuant to rr. 4, 6 or 8 of O. IX or by a Registrar or Executive Officer pursuant to O. XLVIII, is an arbitrary and drastic remedy the granting of which imposes upon the plaintiff the necessity to ensure that service of the summons, with a copy of the plaint attached, has been duly effected in compliance with the rules. Order V, r. 14, is taken from O. V, r. 17, of the Code of Civil Procedure of India, and the effect of the requirement that, to justify service under the rule, the serving officer must have used "all due and reasonable diligence" in attempting to find the defendant is stated in Mulla's Code of Civil Procedure (12th Edn.) at p. 566 as follows:

"To justify such service, it must be shown that *proper efforts were made to find the defendant*, e.g., that the serving officer went to the place or places and at the times where and when it was reasonable to expect to find him. Thus, if a serving officer goes to a defendant's house, but does not find him there, and the defendant's adult son, who is in the house, refuses to accept service on behalf of the father, these facts by themselves do not justify the officer in resorting to the mode of service prescribed by this rule; he must, before effecting such service, inquire of the son as to where the defendant is and otherwise exercise due and reasonable diligence in finding the defendant."

Counsel for the defendant, in his careful argument, referred me to the recent case of *Erukana Kavuma v. Mehta* (1) where McKisack, C.J., in the High Court of Uganda considered the provisions of O. V, r. 14, of the Civil Procedure Rules of Uganda, which corresponds exactly to O. V, r. 12 in Kenya. In that case it was sought to justify service on the defendant's wife on the ground that the process server went to the defendant's shop and, as he expressed himself in his affidavit, "there I did not find the defendant; I was told that the defendant is in India". The learned judge said ([1960] E.A., at p. 306):

"This seems to me a most inadequate ground for saying that the defendant could not be found. The affidavit does not reveal whether or not any inquiry

was made about the defendant's address in India, or whether it was expected that the defendant would return to Uganda from India, and if so, when. The attempt to find the defendant appears to me to have been most perfunctory. I cannot regard absence from Uganda, without any information about the defendant's address (if he has one) in the country to which he has gone, or whether or not he can be found there, and without any information as to the expected length of his absence, or as to when he had left Uganda, as being sufficient grounds for saying that a defendant 'cannot be found'."

The position under O. V, r. 14, in regard to finding the defendant is similar, and as I have already stated, I must hold that the service upon the defendant in the present case was wholly ineffective.

I should perhaps add that the affidavit of service is defective for the further reason that it does not aver that the fixing of the copy of the summons to the premises was carried out in the presence of the person by whom the premises were pointed out to the serving officer, nor does it state the address of that person.

Furthermore, although the rules do not perhaps expressly so provide, the affidavit clearly should state the town and street or other particulars of the situation of the premises to which the summons was affixed. In the present case the affidavit does not even say that the premises in question are within the jurisdiction of this court.

In view of my decision as set out above it is not necessary for me to deal with the alternative ground relied upon by the defendant in seeking to have the judgment and decree set aside.

The circumstances of the case do not appear to justify the imposition of any terms upon the defendant and accordingly I direct that the judgment and decree obtained by the plaintiff on May 25, 1965, together with all proceedings thereunder be set aside and that the chattels, the property of the defendant, which were seized by the court broker in purported execution of the decree, be restored to the defendant forthwith in as good a condition as when seized. The defendant will have his costs of this motion when taxed, with liberty to apply to the court for any directions necessary to give effect to this order.

Appeal allowed.

For the defendant:

Kohli, Patel, Raichura, Kisumu

P. V. Raichura

For the plaintiff:

A. H. Malik & Co., Kisumu

M. T. A. Malik

William Lyle Carnie v Jane Carnie
[1966] 1 EA 233 (CAM)

Division: Court of Appeal at Mombasa

Date of judgment: 20 June 1966

Case Number: 38/1965

Before: Duffus Ag VP, Spry and Law JJA
Sourced by: LawAfrica
Appeal from: The High Court of Kenya – Wicks, J.

[1] Husband and wife – Judicial separation – Alimony – Consent order for permanent alimony – Whether court empowered to vary or modify order – Matrimonial Causes Act (Cap. 152), s. 32 (K.).

[2] Statute – Construction – Legislation adopted from Commonwealth country – English decisions interpreting adopted legislation – Matrimonial Causes Act (Cap. 152), s. 32 (K.) – Supreme Court of Judicature (Consolidation) Act, 1925, s. 196.

Editor’s Summary

The parties were judicially separated in 1939 and a consent order for permanent alimony was made by the court. This order was varied by further consent orders in 1940 and 1952. In September, 1964 the respondent’s application for another modification of the order was resisted on a preliminary point that the court had no jurisdiction to make such an order. The preliminary objection was argued entirely on the question whether power to amend a consent order for alimony is conferred by s. 32 of the Matrimonial Causes Act. The judge in allowing the application held that he had power to make such an order by virtue of s. 14(1) of the English Administration of Justice (Miscellaneous Provisions) Act, 1938, which in his opinion was imported into Kenya by s. 3 of the Matrimonial Causes Act. In the alternative, he considered that he had that power under s. 32 of the Matrimonial Causes Act and stated that he was not bound by the English authorities which give a narrow interpretation to s. 196 of the Supreme Court of Judicature (Consolidation) Act, 1925 (now repealed) which section corresponds to s. 32 of the Matrimonial Causes Act. On appeal it was submitted that the meaning of s. 3 of the Matrimonial Causes Act is to be construed in the same way as were the corresponding provisions of the Supreme Court of Judicature (Consolidation) Act, 1925, and that it could not have been intended to import into Kenya provisions of an English amending Act which the legislature of Kenya could have incorporated in the Matrimonial Causes Act had they thought fit to do so; that the interpretation placed on s. 196 of the Supreme Court Judicature (Consolidation) Act, 1925, by the English courts ought to be applied and that even if the English authorities were ignored, s. 32 of the Matrimonial Causes Act ought to be interpreted narrowly.

Held –

- (i) s. 3 of the Matrimonial Causes Act provides that the other provisions of that Act are to be interpreted in the same way as the corresponding provisions of English Acts from which they are derived and that English law may be looked to in any matters for which the Act fails to provide;
- (ii) s. 14(1) of the Administration of Justice (Miscellaneous Provisions) Act, 1948 does not apply to Kenya;
- (iii) (Duffus, J.A., dissenting), s. 32 of the Matrimonial Causes Act, which empowers a court to vary or modify any order for the periodical payment of money, does not enable the court to modify a consent order for alimony made in proceedings for judicial separation.

Appeal allowed.

Cases referred to in judgement:

- (1) *King v. King*, [1954] P. 55.
- (2) *Turk v. Turk*, *Dufty v. Dufty*, [1931] P. 116.
- (3) *Abbott v. Abbott*, [1931] P. 26.

The following judgments were read:

Judgment

Spry JA: The parties to this appeal were judicially separated in 1939 and shortly thereafter, on January 25, 1939, a consent order for permanent alimony was made by the High Court (then H.M. Supreme Court) of Kenya. This order was varied by consent orders made on January 27, 1940, and November 21, 1952.

By chamber summons dated September 8, 1964, Mrs. Carnie applied to the court for a further modification of the order for permanent alimony. At the first hearing of the application, counsel for the appellant, Mr. Carnie, took the preliminary point that the court had no jurisdiction to make the order applied for. The preliminary objection was argued entirely on the question whether power to amend a consent order for alimony is conferred by s. 32 of the Matrimonial Causes Act (Cap. 152). It may be that an order could have been made under s. 26 (see *King v. King* (1)) but it appears to have been conceded that the present application, while not specifying the section under which it was made, could, in the form in which it was made, only be one for an order under s. 32. The learned trial judge held that he had power to make such an order by virtue of s. 14(1) of the English Administration of Justice (Miscellaneous Provisions) Act, 1938, which in his opinion was imported into Kenya by s. 3 of the Matrimonial Causes Act. In the alternative, he considered that he had that power under the plain meaning of s. 32 of the Matrimonial Causes Act and in this connection he expressed the opinion that he was not bound by English authorities which give a narrow interpretation to s. 196 of the Supreme Court of Judicature (Consolidation) Act, 1925, (now repealed) the provision corresponding to our s. 32. His reason for not considering himself bound was that the Supreme Court of Judicature (Consolidation) Act, 1925, was expressed to be a consolidating act only and the courts in England were bound by historical considerations, whereas the Kenya Matrimonial Causes Act is expressed to be an amending as well as a consolidating Act.

It is against that decision on the preliminary objection that the present appeal is brought.

The first ground of appeal that was argued by counsel for the appellant was that the learned trial judge had erred in law in holding that the provisions of s. 14(1) of the English Administration of Justice (Miscellaneous Provisions) Act, 1938, applies to Kenya or were made applicable to Kenya by virtue of the provisions of s. 3 of the Matrimonial Causes Act or otherwise.

Section 3 of the Matrimonial Causes Act reads as follows:

- “3. Subject to the provisions of the African Christian Marriage and Divorce Act, jurisdiction under this Act shall only be exercised by the High Court (hereinafter called ‘the court’) and such jurisdiction shall, subject to the provisions of this Act, be exercised in accordance with the law applied in matrimonial proceedings in the High Court of Justice in England.”

Counsel for the appellant submitted that the meaning of that section is that the Matrimonial Causes Act is to be construed in the same way as were the corresponding provisions of the Supreme Court of Judicature (Consolidation)

Act, 1925, in England. He argued that it could not have been intended to import into Kenya provisions of an English amending Act which the legislature of Kenya could have incorporated in the Matrimonial Causes Act had they thought fit to do so. It was significant that other amending provisions had been so incorporated. Furthermore, s. 14(1) of the Administration of Justice (Miscellaneous Provisions) Act, 1938, must be regarded as inconsistent with the provisions of s. 32 of the Matrimonial Causes Act, and so expressly excluded by s. 3 of that Act, since it replaced s. 196 of the Supreme Court of Judicature (Consolidation) Act, 1925 (the equivalent of s. 32) and that section was expressly repealed by s. 20 of the Administration of Justice (Miscellaneous Provisions) Act, 1938.

Counsel for the respondent, Mrs. Carnie, found it difficult to support this part of the learned judge's decision.

For my part, I accept counsel for the appellant's arguments and I am satisfied that all that s. 3 of the Matrimonial Causes Act does, is to provide that the other provisions of that Act are to be interpreted in the same way as the corresponding provisions of English Acts from which they are derived and that English law may be looked to in any matters for which the Act fails to provide. I do not consider that s. 14(1) of the Administration of Justice (Miscellaneous Provisions) Act, 1938, has any application in Kenya.

The second and third grounds advanced in the memorandum of appeal were argued together: they amount to a submission that the learned judge erred in law in holding that he could make an order under the provisions of s. 32 of the Matrimonial Causes Act varying a consent order for alimony made in proceedings for judicial separation. On this, counsel for the appellant advanced two arguments: in the first place, he submitted that the interpretation placed on s. 196 of the Supreme Court of Judicature (Consolidation) Act, 1925, by the English courts ought to be applied to s. 32 of the Matrimonial Causes Act. both because it is a general rule of interpretation that where one country adopts without material alteration a provision from the law of another country which has received judicial interpretation in the latter country, the former country is presumed to have adopted the provision as so interpreted, and because, where s. 32 is concerned, the courts of Kenya are expressly directed to do so by s. 3 of the Matrimonial Causes Act. Secondly, he argued that even if English authorities were ignored, s. 32 of the Matrimonial Causes Act ought to be interpreted narrowly because, although at first sight the reference in that section to orders "for the periodical payment of money" would appear to cover any order for the payment of alimony, on a closer examination of the Act, it appears that different forms of words are used to describe different kinds of payment, thus there are references to the payment of annual sums of money (s. 25 (2) and s. 30 (3)) and monthly or weekly sums (s. 25 (3)) while, apart from s. 26 which was not part of the Act as originally passed, orders "for the periodical payment of money" are only referred to in ss. 21, 27 (3) and 32 and therefore these sections should be read together and s. 32 be interpreted as relating only to orders made on applications for the restoration of conjugal rights.

Again, the proviso to s. 25 (3) gives the court a limited power to vary orders for maintenance made on a decree for divorce or nullity of marriage. This would be inconsistent with s. 32 if that section conferred an unlimited power to vary orders and this therefore supports the view that s. 32 does not apply to all orders for "periodical payments", using those words in the wider sense.

As regards the English interpretation of s. 196 of the Supreme Court of Judicature (Consolidation) Act, 1925, counsel for the appellant relied on *Turk v. Turk*, *Duffy v. Duffy* (2) and *Abbott v. Abbott* (3). He submitted that the reasons which led the English courts to their conclusions were immaterial;

all that concerned the Kenya courts was that there was an established interpretation which the legislature of Kenya had directed should be followed here.

Counsel for the respondent submitted that the learned judge was right to adopt the ordinary meaning of the words “order for the periodical payment of money”. He argued that in *Dufty v. Dufty* (2) the court had felt inhibited from applying the natural meaning of the words because the Act in which they occurred was a consolidating act and he submitted that no such consideration applied here. He argued further, first, that from 1904-1939 the courts in Kenya had had power to vary orders for alimony, if only downwards, and that it would be extraordinary if the legislature had withdrawn that power, when only a year before the English legislature had widened the power of the courts there to vary such orders; and, secondly, that the fact that s. 26 had been added in 1952, in which the words “periodical payment” are used otherwise than in relation to the restitution of conjugal rights, negatives the argument that this is a technical expression or term of art.

In my opinion, the arguments advanced on behalf of the appellant, which are cumulative and not alternative, are irresistible. It is, I think, significant that the legislature, in enacting the Matrimonial Causes Ordinance, 1939 (now Cap. 152) followed almost word for word the corresponding provisions of the English Supreme Court of Judicature (Consolidation) Act, 1925, as amended by the English Matrimonial Causes Act, 1937. This fact, coupled with the express provisions of s. 3 of the Matrimonial Causes Act, leaves no possible doubt that the intention of the legislature was to reproduce the English law on the subject. At a later date, the legislature followed the provisions of the English Law Reform (Miscellaneous Provisions) Act, 1949. But, whether deliberately or by oversight, the legislature has not followed s. 14 of the Administration of Justice (Miscellaneous Provisions) Act, 1938. It would, in my opinion, be wrong for us to do by way of interpretation what the legislature has not thought fit to do. I think that s. 32 of the Matrimonial Causes Act must be read as s. 196 of the Supreme Court of Judicature (Consolidation) Act, 1925, was read in England immediately prior to its repeal. In my view it relates only to orders made under s. 21, and possibly s. 26. I think therefore that this appeal should succeed and I would set aside the ruling of the learned trial judge and the formal order made pursuant to it. I would substitute an order dismissing the application for want of jurisdiction.

I have not thought it necessary to deal with all the arguments advanced by counsel for the appellant, nor do I think it necessary to consider whether the order for alimony originally made, which included the words “with liberty for both the parties to apply” should be regarded as equivalent to one made “until further order” or whether, if so, there would have been power to modify the order under common law, derived from the old ecclesiastical, as opposed to the statutory, jurisdiction, because those questions were not raised by cross-appeal, presumably because counsel for the appellant is not resident within the jurisdiction of the High Court of Kenya.

As regards costs, counsel made no special submissions but left the matter to the discretion of the court. I do not think that the considerations which govern orders for costs on petitions for divorce or judicial separation necessarily apply to applications for ancillary relief. At the same time, the existence of the marital relationship is a factor to be taken into account. I would add that we are hampered by lack of information as to the circumstances of the parties, as the relevant facts on the record are all in issue. On the whole, I think the fairest order that we are in a position to make is that each party bear his or her own costs, both in the High Court and of the appeal, and I would so order.

Duffus Ag VP: This is an appeal from the ruling of a judge of the High Court that he had jurisdiction to hear an application to vary an order for permanent alimony made in judicial separation proceedings in 1939.

The learned judge found that he had jurisdiction to hear the application by reason of the provisions of s. 14(1) of the English Administration of Justice (Miscellaneous Provisions) Act, 1938, which he held applied to Kenya by virtue of s. 3 of our Matrimonial Causes Act (Cap. 152), or in the alternative, he found that he also had jurisdiction by virtue of s. 32 of the Matrimonial Causes Act.

I entirely agree with Spry, J.A., that for the reasons he has stated the provision of s. 14(1) of the Administration of Justice (Miscellaneous Provisions) Act, 1938, do not apply to Kenya.

The question of the court's jurisdiction under s. 32 has, however, given me a great deal of concern. Section 32 as reprinted in the 1962 Revised Laws of Kenya is s. 30 of the Matrimonial Causes Ordinance, 1939. This Ordinance was passed and assented to in 1939 but came into force on January 1, 1941. The Ordinance is headed as "an Ordinance to consolidate and amend the law relating to Matrimonial Causes". The 1939 Ordinance was divided into parts. Part III dealt with "Judicial Separation", Part IV with "Restitution of Conjugal Rights" and Part VI "Ancillary Relief". The same division into parts is kept in the Revised Edition (Cap. 152).

Counsel for the appellant submitted on s. 32 that the term "periodical payment of money" had both by virtue of the provisions of the Matrimonial Causes Act itself and by judicial interpretation in England, been given a special meaning; that is, it only applies to "periodical payments" ordered in respect of a decree for restitution of conjugal rights under the provisions of s. 21 of the Act. He relied on the English cases of *Abbott v. Abbott* (3) and *Turk v. Turk – Dufty v. Dufty* (2). The trial judge rejected this submission on the ground that the English cases were so decided because the 1925 Act in England was only a consolidating Act whilst the Act in Kenya was both a consolidating and amending Act.

It is necessary therefore to consider previous legislation in Kenya and having regard to the fact that jurisdiction in matrimonial causes in Kenya shall, subject to the provisions of our law, be exercised in accordance with the law applied in matrimonial proceedings in England, it will be necessary to also consider the law as it existed in England. The Divorce Law was first introduced into Kenya in 1904 by the Divorce Ordinance No. 12 of 1904. This Ordinance appears without any amendments as Cap 170 in the 1926 Edition of the Laws of Kenya and continued in force without amendments until the Matrimonial Causes Ordinance of 1939. The law therefore in force on the date of the consent order, now sought to be varied, was the 1904 Ordinance. Section 15 of that Ordinance provided for the granting of a judicial separation and s. 25 provided for an order for alimony and s. 26 for the discharge or alteration of this order but only when the husband subsequently became unable to make the payments. It is to be noted that while s. 21 of that Ordinance provided for a decree for the restitution of conjugal rights, no provisions was then made for an order for any type of payment to the wife. The law was considerably altered in Kenya by the 1939 Ordinance. I would refer to those provisions of s. 25 of Part VI of that Act which read as follows:

"25(1) . . .

- (2) The court may, if it thinks fit, on any decree for divorce or nullity of marriage, order that the husband shall, to the satisfaction of the court, secure to the wife such gross sum of money . . .

- (3) In any such case as aforesaid the court may, if it thinks fit, by order, either in addition to or instead of an order under sub-s. (2) of this section, direct the husband to pay to the wife during the joint lives of the husband and wife such monthly or weekly sum for her maintenance and support as the court may think reasonable:

Provided that –

- (i) if the husband, after any such order has been made, becomes from any cause unable to make the payments, the court may discharge or modify the order, or temporarily suspend the order as to the whole or any part of the money ordered to be paid, and subsequently revive it wholly or in part as the court thinks fit; and
- (ii) where the court has made any such order as is mentioned in this subsection and the court is satisfied that the means of the husband have increased, the court may, if it thinks fit, increase the amount payable under the order.”

It is to be noted here that the proviso to sub-s. (2) only applies to decrees of divorce and nullity and does not apply to decrees for the restitution of conjugal rights or for a judicial separation. This power is given by sub-s. (4) which reads –

- “(4) Where any decree for restitution of conjugal rights or judicial separation is made on the application of the wife, the court may make such order for alimony as the court thinks just.”

The powers given in sub-s. (4) are very wide and must, in my view, include a power to order payment of alimony by periodical payments, but would not appear to give the court any power to vary the order once it is made.

We then come to the provisions of s. 32, the power to vary an order. This section brought in by the 1939 Ordinance also comes under the heading Part VI “Ancillary Relief” and reads as follows:

- “32. The court may from time to time vary or modify any order for the periodical payment of money made under this Act either by altering the times of payment or by increasing or diminishing the amount, or may temporarily suspend the order as to the whole or any part of the money ordered to be paid, and subsequently revive it wholly or in part, as the court thinks just.”

The appellant’s case is that this order only applies to these periodical payments which may be ordered to be paid in cases of a decree for the restitution of conjugal rights under s. 21 of the Act and that the term “periodical payment” both by the wording of the Act and by the custom in England and the English decisions can only mean orders made under s. 21. There is considerable merit in this argument especially as s. 21 itself differentiates between a periodical payment and an order for alimony, and the fact that s. 25 specifically gives power to alter orders only in respect to divorce or nullity.

On the other hand there could be no doubt that the words in s. 32 “any order for the periodical payment of money” would, if given its normal wide meaning, cover any order for alimony by periodical payments. Considerable weight is lent to this interpretation by the fact that nowhere else in the 1939 Ordinance was any provision made to vary any order for alimony by periodical payment in respect of a decree for judicial separation, whilst on the other hand, some provision is made in respect of decrees for divorce or nullity of marriage by the provision of s. 25 (3) and admittedly s. 32 does apply to decrees for restitution

of conjugal rights. If therefore the interpretation of s. 32 is that it only applies to orders for periodical payments in decrees for restitution of conjugal rights under s. 21, then the legislature has, for some reason, decided to treat orders for alimony on a judicial separation quite differently from the other three types of matrimonial causes in which decrees may issue. This would also mean, as counsel for the respondent pointed out that while under the 1904 legislation the courts at least had the power to reduce the payments for alimony in a judicial separation, that in the 1939 Ordinance which was an amending Ordinance giving the courts more and wider powers, the legislature had decided to take away all the court's power to vary orders for alimony in a judicial separation. I am convinced that the legislature could not have intended this result and that the intention was that s. 32 should have its ordinary plain meaning and that is, as it clearly states, to vary or modify any order for the periodical payment of money made under the Act which would include any orders for alimony by periodical payments. I would here consider the English cases. Counsel for the respondent submitted that the reasons for the decision in the English cases did not affect this issue and that what mattered was the existing definition of "a periodical payment" at the time the 1939 Ordinance was passed. I agree that this may be so but the main issue is whether the interpretation of s. 32 is intended to confine the words "any order for the periodical payment of moneys under this Act", to a narrow definition as meaning only those payments described in s. 21 or whether it should be given its full meaning of "any order" for a periodical payment under the Act. In this respect the reasons given for their decision by the English courts are helpful. In the case of *Abbott v. Abbott* (3) Langton, J., in his judgment referred to the history of the expression "periodical payments" and also to the fact that s. 196 of the English Act was largely copied from the earlier Act in England of 1884 and also to the fact that the term "periodical payment" was used in the English Act solely with reference to the question of decrees for the restitution of conjugal rights and he then held, I quote:

"Accordingly, notwithstanding that the words are in themselves wide enough to cover an order final or otherwise for alimony pendente lite, I think that I ought to hold that the term or expression 'periodical payment' was, and is, employed in the section only with reference to matters appertaining to restitution of conjugal rights."

In the case of *Dufty v. Dufty* (2) Lord Merrivale, P., based his judgment in part, on the fact that the English Act of 1925 was a consolidating Act and was not amending the law but he also referred to the fact that s. 187 which is similar to our s. 21 re-enacted the provision of the English Matrimonial Causes Act, 1884, and that section showed the statutory meaning of the words "periodical payment".

In Kenya previous to 1939 the only legislation was the 1904 Act in which there was no provision for any payment to be ordered on a decree for the restitution of conjugal rights and no mention of periodical payments. In England there was the Matrimonial Causes Act of 1884 which was not enacted in Kenya. This Act specifically dealt with periodical payments in cases of Restitution of Conjugal Rights. Then followed in Kenya the 1939 Ordinance and this Ordinance was, as the learned trial judge pointed out, not only a consolidating Act but also an amending Act. In this Ordinance while the courts are given wide powers to order alimony in cases of judicial separation there is no other provision made to vary or modify this order except the provisions of s. 32.

The important difference is that in England when the Supreme Court of Judicature (Consolidation) Act, 1925, came into force, there was then in existence specific provision for orders to be made for periodical payments in cases of restitution of conjugal rights and s. 196 repeated s. 4 of the Matrimonial Causes

Act, 1884, which only dealt with decrees for the restitution of conjugal rights. The law in Kenya was completely different, here provision for maintenance in decrees for the restitution of conjugal rights is introduced for the first time by s. 21 of the 1939 Act, and whilst in the English Act of 1884 the power to modify an order for periodical payments followed immediately after provision had been made for such payments by ss. 2 and 3, here in Kenya this power of modification only follows after provision has been made for all kinds of periodical payments.

I am of the view also that the fact that this power under s. 32 is placed in Part VI under the heading “Ancillary Relief” must have some meaning. If it was intended that s. 32 was only to apply to periodical payments under s. 21, one would have expected the legislation to have placed this provision in Part IV which deals with restitution of conjugal rights and provides for these periodical payments and not to have given this power as here, under Part VI, after the Act had then dealt with all types of maintenance or alimony, including provision for other periodical payments as in this case. Under s. 18 of our Interpretation Act the court in interpreting a written law takes into consideration the division of the law into chapters, parts, titles or other such divisions.

Finally, I am of the view that the word “any” and also the words “under this Act” in the whole sentence “any order for periodical payment under this Act” must be given their ordinary meaning, and that this must mean “any kind of periodical payment which has been ordered under the Act”, that is, it might mean an order for weekly, monthly or other periodical payment which could have been ordered under s. 21, s. 25, s. 26 or under s. 30, of the Act.

I am therefore of the view that s. 32 should be given its full and ordinary meaning and that it applies as it states to any order for the periodical payment of money under the Act and this would include an order on a decree of judicial separation. I would therefore have found that the judge did have jurisdiction to hear this application and dismiss this appeal.

Both the other members of the court have, however, held that the provisions of s. 32 do not apply to orders made in judicial separation proceedings and in accordance with their judgments the appeal will be allowed and in this event I agree with the order as to costs proposed by Spry, J.A. There will, therefore, be an order allowing the appeal in the terms set out in the judgment of Spry, J.A.

Law JA: I am in agreement with Duffus, Ag. V.-P. and Spry, J.A., that s. 14(1) of the English Administration of Justice Act, 1938, has no application to Kenya, for the reasons given by Spry, J.A. My learned brothers are, however, not in agreement on the point whether s. 32 of the Matrimonial Causes Act (Cap. 152), which empowers a court to vary or modify any order for the periodical payment of money, applies to a consent order for alimony made in proceedings for judicial separation. I have come to the conclusion that it does not, for the following reasons:

- (a) rule 3 (f) of the Matrimonial Causes Rules, which form a Schedule to the Act, distinguishes between “periodical payments” and “alimony” or “maintenance”;
- (b) subsection (3) of s. 25 of the Acts makes provision for varying or modifying orders for the payment of monthly or weekly sums for the maintenance of a wife, in suits for divorce or nullity;
- (c) section 30 of the Act gives a power to a court “from time to time, either before or by or after the final decree” to make provision for the maintenance of children, in suits for divorce, nullity or judicial separation. This necessarily includes a power to vary or modify any existing order.

I am thus driven to the conclusion that the power conferred by s. 32 to vary and amend orders for the periodical payment of money cannot have been intended to be of general application. If it had been so intended, there would have been no need to provide the power to vary or amend orders for the payment of maintenance for the benefit of wives and children contained in ss. 25 and 30 of the Act. In my view s. 32 only applies to those sections which provide specifically for the making of orders for periodical payments as such, that is to say s. 21 (restitution of conjugal rights) and s. 26 (wilful neglect to provide reasonable maintenance).

I appreciate that if my interpretation of the Act is correct, the courts have no power to vary or modify an order for alimony made in favour of a wife in proceedings for judicial separation, although she may have a remedy under s. 26, if she can prove wilful neglect on the part of her husband to provide reasonable maintenance, see *King v. King* (1).

For these reasons, I agree with Spry, J.A., that this appeal succeeds, and I also agree that the parties should bear their own costs.

Appeal allowed.

For the appellant:

Atkinson, Cleasby & Co., Mombasa

R. P. Cleasby

For the respondent:

Robert Mollart, Mombasa

Wynn Jones Mbwambo v Wandoa Petro Aaron
[1966] 1 EA 241 (CAD)

Division:	Court of Appeal at Dar-es-Salaam
Date of judgment:	12 April 1966
Case Number:	184/1965
Before:	Newbold P, Duffus and Spry JJA
Sourced by:	LawAfrica
Appeal from:	The High Court of Tanzania – Georges, C.J.

[1] *Affiliation – Applicant had three children born out of wedlock, each of a different father – Application refused because of loose morals – Refusal by magistrate to infer that putative father was only person to have sexual intercourse with complainant.*

[2] *Affiliation – Evidence – Corroboration – Letter to applicant expressed in endearing terms saying he still remembered “that night” – Sexual intercourse alleged to have taken place at material time –*

Whether such evidence corroborative of paternity of child or only of sexual intercourse.

[3] Appeal – Jurisdiction – Questions of fact – Whether appellate court has power to interfere with findings of fact – Distinction between finding of fact and an inference from evidence.

Editor's Summary

The respondent had applied to the district court for the issue of a summons under s. 3 of the Affiliation Ordinance alleging that the appellant was the father of her child born on February 4, 1964. The respondent had had three children, all out of wedlock, and each child was of a different father; she had lived for some time as man and wife with the father of her third child; he had been detained early in April, 1963, and it was while he was in detention that the respondent had met and associated with the appellant. The trial magistrate dismissed the application and held that on her own evidence the applicant was

a woman of loose character and apparently of considerable sexual appetite, and though he was prepared to infer that the appellant had had sexual intercourse with the respondent at the material time he was not prepared to hold that he was the only person who had intercourse with her. On appeal to the High Court, the learned Chief Justice held that there was nothing on which the trial magistrate could base his view that there was a possibility that she had had sexual intercourse with some other person, and that it was established that the appellant did have sexual intercourse with her at a material time. He accordingly allowed the appeal and adjudged the appellant to be the putative father of the child. The appellant thereupon appealed and argued that the Chief Justice was not entitled to interfere with the magistrate's finding of fact that the appellant was not the only person to have had sexual intercourse with the respondent at the material time. Another ground of appeal was that the Chief Justice had erred in holding that the Affiliation Ordinance did not require corroborative evidence of paternity and in particular, erred in holding that the respondent was "amply corroborated in material particulars". It was submitted that such corroborative evidence as there was was only corroborative as to sexual intercourse between the appellant and the respondent not as to the paternity of the child, and further that the appellant's letter in which he stated that he still remembered "that night" could not amount to corroboration because it was capable of being read in an innocent way.

Held –

- (i) however reluctant a first appellate court may be to interfere with findings of fact, there could be no doubt that it had jurisdiction to do so, but in this case, an inference and not a finding of fact was reversed;
- (ii) the fact that the respondent appeared to have loose morals was reason for the magistrate to treat her evidence with the greatest caution but it could not make good the absence of evidence to support the allegation that the respondent was associating with other men;
- (iii) section 5 (1) of the Affiliation Ordinance did not require corroboration of any particular aspect of the respondent's evidence but only that it be corroborated in some material particular, and there could be no particular more material than the fact of sexual intercourse between the parties at the relevant time;
- (iv) the court was not required to find as a fact that the appellant was the father of the child but only that he was the putative father;
- (v) the letter from the appellant expressed in endearing terms and saying that he still remembered "that night" undoubtedly "tended" to prove that he was the father of the child;
- (vi) corroborative evidence need do no more than show the probability that the mother's evidence implicating the man is true; it must point to the man as the probable father, but it is not correct to say that it must be incapable of any other interpretation.

Appeal dismissed.

Cases referred to in judgment:

- (1) *Peters v. Sunday Post Ltd.*, [1958] E.A. 424 (K.).
- (2) *Trevor Price and Another v. Kelsall*, [1957] E.A. 752 (C.A.).
- (3) *Simpson v. Collinson*, [1964] 1 All E.R. 262.

(4) *Thomas v. Jones*, [1921] 1 K.B. 22.

(5) *Moore v. Hewitt*, [1947] 2 All E.R. 270.

Judgment

Spry JA, read the following judgment of the court: The respondent applied to the District Court of Dar-es-Salaam for the issue of a summons under s. 3 of the Affiliation Ordinance (Cap. 278) to the appellant. She alleged that the appellant was the father of a child born to her on February 4, 1964. At the conclusion of the hearing, the learned trial magistrate dismissed the application. He held that “on her own evidence the applicant is a woman of loose character and apparently of considerable sexual appetite”. He was prepared to infer that the appellant had had sexual intercourse with the respondent at the material time but was not prepared “to infer that he was the only person who had intercourse with her”.

The respondent appealed to the High Court against this decision. The learned Chief Justice reviewed the evidence in detail and the findings of the trial magistrate. He began by observing that the trial magistrate’s remarks on the character and appetite of the respondent were only an inference drawn from her evidence. What she had said was that she had borne three children, all out of wedlock and each the child of a different father. She had lived for some time as man and wife with the father of her third child. He had been detained early in April, 1963, and it was while he was in detention that the respondent had met and associated with the appellant. The learned Chief Justice remarked that it was not irrelevant that the respondent had had a miscarriage on March 2, 1963. He concluded:

“On this evidence, while it may be said with some justification that the appellant is a woman of loose character, I can see no reason for the inference that she is also a person of considerable sexual appetite. Indeed, while there is evidence that there have been at least three men in her life, there is no evidence that she shared her favours with any two of them at the same time. As a result of this, it is my view that in the absence of any evidence to indicate that she had some other lover in the period April to June, 1963, there was nothing on which the magistrate could base his view that there was a possibility or a probability that she had had sexual intercourse with some person other than the respondent in this matter. It is clearly established that the respondent did have sexual intercourse with her at a time material having regard to the date of the birth of the child. There is evidence corroborating the association between them and the probability of intercourse, and there is no evidence to show that anyone else was having intercourse with her during that period.”

He accordingly allowed the appeal, adjudged the appellant to be the putative father of the child and remitted the proceedings to the District Court to determine what order should be made for the maintenance and education of the child.

From that decision, the appellant now appeals to this court.

The first ground of appeal was a submission that the learned Chief Justice erred in law in reversing the magistrate’s refusal to infer that the appellant was the only person to have had sexual intercourse with the respondent at the material time.

Counsel for the appellant began by submitting that the learned Chief Justice was not entitled in law to interfere with what was substantially a finding of fact by the trial court. That submission, with respect, I have no hesitation in rejecting. However reluctant a first appellate court may be to interfere with findings of fact, there can be no doubt that it has jurisdiction to do so (*Peters v. Sunday Post Ltd.* (1)). But in the present case the learned Chief Justice was not reversing a finding of fact but an inference from the evidence, and as was said by O’Connor, P., in *Price v. Kelsall* (2):

“when it is apparent that wrong inferences have been drawn from the evidence, it is the duty of an appellate court to evaluate the evidence itself.”

I see equally little merit in the substantive part of this ground of appeal, which I understood counsel for the appellant finally to abandon. The respondent having given evidence, which the magistrate apparently accepted, of sexual intercourse with the appellant, and having also given evidence that she had not had intercourse with any other man at the relevant time, and assuming that there was corroboration of her evidence, a matter to which I shall return later, it appears to me that the provisional burden of proof then shifted to the appellant, if and so far as he alleged that she had been having intercourse with another man or men. It is unnecessary to consider here the standard of evidence required – it might well in the circumstances have been low – because no evidence whatever was given of any association with any other man at or around the relevant time. The fact that the respondent appears to have been of loose morals was reason for the magistrate to treat her evidence with the greatest caution but it could not in itself make good the complete absence of evidence to support the allegation that the respondent was associating with other men, an allegation, I may add, which was only implicit in the defence and never, apparently, expressly advanced.

The second ground of appeal as it appears in the memorandum was not argued, counsel for the appellant at the hearing of the appeal applying for leave to substitute and argue a different ground, essentially one of fact, which application we refused.

The third ground of appeal was that the learned Chief Justice “erred in law in holding that the Affiliation Ordinance made no provision as to the need for corroborative evidence of paternity and in particular, erred in law in holding that the respondent was ‘amply corroborated in material particulars’”. On this ground, counsel for the appellant submitted that such corroborative evidence as there was was only corroborative as to sexual intercourse between the appellant and the respondent and was not corroborative as to the paternity of the child. He argued that corroborative evidence must go to the conduct of the alleged father in relation to the child.

The relevant part of the judgment reads as follows:

“There was much argument as to the need for corroborative evidence of paternity. The Ordinance makes no such provision. What it does require is that the evidence of the mother be corroborated in a material particular. I agree that corroboration of evidence of opportunity alone is not enough, especially when the opportunity arises innocently in the course of the normal business of day to day living. Here there is more than corroboration of opportunity as given by Zyaga Omari. There is the letter which leads to an inference of intimacy and a direct reference to a night which can reasonably be held to be a night worth remembering. The respondent has not said why. The appellant has. The mother is thus amply corroborated in material particulars.”

I think the simple answer to counsel’s submission is to be found in the words of s. 5 (1) of the Affiliation Ordinance, which requires that the evidence of the mother “be corroborated in some material particular by other evidence to the satisfaction of the magistrate”. The section does not require corroboration of any particular aspect of the mother’s evidence, only that it be corroborated in some material particular. I can think of no particular more material than the fact of sexual intercourse at about the relevant time between the appellant and the respondent. If there was corroboration of the respondent’s evidence in that respect, I think the requirement of the section has been amply satisfied.

I am strengthened in my opinion by perusal of the judgment of Danckwerts, L.J., in the case of *Simpson v. Collinson* (3), (a case not referred to by counsel) in which he considered fully the meaning of the words “in some material particular” in the corresponding English legislation.

If any further argument were needed, it might be added that the court is not required to find as fact that the person summoned is the father of the child but only that he is the putative father. In the absence of any rebutting evidence, the fact that the person summoned had sexual intercourse with the mother at the relevant time is enough to justify a finding that he is the putative father, and corroboration of the wife’s evidence to that effect is therefore the best possible corroboration.

Counsel for the appellant also argued that the matters relied on as corroboration by the learned Chief Justice could not, in law, amount to corroboration. In particular, he argued that the letter referred to could not amount to corroboration because it was capable of being read in an innocent way. He relied on *Thomas v. Jones* (4), especially the statement of Atkin, L.J. ([1921] 1 K.B. at p. 45):

“It must be evidence which tends to prove that the man is the father of the complainant’s child; in other words, it must be evidence implicating the man, evidence which makes it more probable than not that the respondent to the summons is the father of the child.”

I respectfully accept that as a true statement of the law, and applying it to the facts of the present case, I should have thought that a letter written by the appellant shortly after the alleged intercourse, expressed in endearing terms and saying that he still remembered “that night” undoubtedly “tended” to prove that he was the father of the child.

In any case, I think, with respect, that counsel is putting the standard of proof far too high. Corroborative evidence need do no more than show the probability that the mother’s evidence implicating the man is true. It must point to the man as the probable father but it is not correct to say that it must be incapable of any other interpretation. In several English cases (which, the law being substantially the same and there being no East African authority, have strong persuasive value), notably *Moore v. Hewitt* (5), evidence of association on terms of close affection has been held corroborative, and such evidence is certainly not incapable of an innocent explanation. As Atkin, L.J., said, it is enough if it tends to prove that the man is the father of the child.

In my respectful opinion, the learned Chief Justice directed himself correctly in law and I think that the grounds of appeal advanced show no reason to interfere with his judgment. I would dismiss the appeal with costs.

Newbold P: I agree. The appeal is dismissed with costs.

Duffus JA: I also agree.

Appeal dismissed.

For the appellant:

Mahmud N. Ratansey & Co., Dar-es-Salaam

M. N. Ratansey

For the respondent:

S. J. Jadeja & Co., Dar-es-Salaam

S. J. Jadeja

Dhanji Hansraj Hirji Chandaria v Republic
[1966] 1 EA 246 (CAN)

Division: Court of Appeal at Nairobi
Date of judgment: 18 June 1966
Case Number: 76/1966
Before: Sir Clement de Lestang Ag P, Spry Ag VP, and Law JA
Sourced by: LawAfrica
Appeal from: The High Court of Kenya – Sir John Ainley, C.J., and Rudd, J.

[1] Exchange Control – Attempt to make external payment for or to non-resident – Whether payee resident outside scheduled territories – Whether dual residence possible – Exchange Control Act (Cap. 113), s. 8 (1), (K.).

[2] Evidence – Admissibility – Entries in public records – Forms completed for immigration purposes by members of the public – Whether “any other person” includes such members of the public – Evidence Act, 1963, s. 38, (K.).

[3] Evidence – Burden of proof – Facts especially within knowledge of accused – Exchange Control – Whether accused had special knowledge of residence – Evidence Act, 1963, s. 111 (1), (K.).

[4] Criminal law – Appeal – Cross-appeal possible by letter or notice.

[5] Practice – Criminal appeal – Cross-appeal possible by letter or notice.

Editor’s Summary

The appellant was charged and convicted on eleven counts of attempting to commit offences under s. 8 of the Exchange Control Act (Cap. 113). The appellant sent 78 envelopes addressed to one K.H.C. in London containing currency notes; all were intercepted in the Post Office in Nairobi. In a search at the business premises of the appellant six similarly addressed envelopes were found containing currency notes and ten without contents. Under s. 8 (1) no person resident in Kenya shall subject to certain provisions, make any payment outside Kenya to or for the credit of a person resident outside the scheduled territories. The appellant admitted that he was a resident of Kenya and the substantial question was whether K.H.C. was a person resident outside the scheduled territories. The prosecution sought to prove this by immigration forms completed by K.H.C. and his wife and by a letter seized by the police from the appellant. The trial magistrate in convicting the appellant on all counts held that the documents were admissible. The High Court on appeal held that this evidence was inadmissible but that there was no failure of justice. On further appeal, it was argued on behalf of the appellant that for the purposes of the Act a person could have only one residence, and that K.H.C. had been resident in Kenya; that there was no evidence to show a change of residence and that, although the evidence showed that K.H.C. was physically in England, it fell short of proving to the standard required in criminal proceedings that he had taken up residence there. It was further argued that the High Court had erred in law in holding that the

admission by the trial magistrate of inadmissible evidence had not occasioned any failure of justice. The Republic lodged a cross-appeal and contended that as the documents constituted part of an official record had been completed by K.H.C. and his wife “in performance of a duty specially enjoined by the law” of Kenya they were admissible under s. 38 of the Evidence Act; that the Exchange Control Act contemplated dual residence; that the letter seized by the police clearly showed that K.H.C. was living in London with his wife and children and that he was carrying on a business there and was considering buying a building. It was also submitted that this was a case where s. 111 of the Evidence Act applied so as to place the burden of proving K.H.C. s residence on the appellant as being a fact specially within his knowledge.

Held –

- (i) there was no provision under the rules of the Court of Appeal for Eastern Africa for cross-appeals in criminal appeals, but it was right to give notice formally or by letter to the court and to the appellant if any ruling of a lower court was going to be challenged by way of cross-appeal;
- (ii) reading s. 38 of the Evidence Act as a whole, “any other person” meant any person, not a public servant, who found himself under a specific duty to maintain or make entries in any record of a public or official nature; it did not include members of the general public completing forms necessary for their individual purposes, whether or not those forms eventually formed part of the archives of any government department;
- (iii) though the appellant might think he knew all the primary facts from which the residence of K.H.C. could be inferred, and he might have received a statement from K.H.C. purporting to set out his intentions, these could do no more than found a belief in the appellant’s mind as to K.H.C.’s residence; it could not be a matter within the knowledge of the appellant and therefore, s. 111 of the Evidence Act would not apply;
- (iv) the Exchange Control Act recognised dual residence;
- (v) the admission of the inadmissible evidence had been highly prejudicial to the appellant since it deprived him of the possibility of an acquittal.

Appeal allowed. Convictions and sentences in respect of the eleven counts set aside.

Cases referred to in judgment:

- (1) *Lekraj Kuar v. Mehpal Singh* (1879), 5 Cal. 744.
- (2) *R. v. Kakelo*, [1923] 2 K.B. 793.
- (3) *Minister for Industry and Commerce v. Steele* (1952), I.R. 304.
- (4) *Mohamed Hassan Ismail v. R.* (1955), 22 E.A.C.A. 461.

Judgment

Spry Ag VP, read the following judgment of the court: The appellant was charged with twenty-four offences against the Exchange Control Act (Cap. 113), but a nolle prosequi was entered in respect of two of these. Of the remaining twenty-two, eleven counts alleged attempts to commit offences contrary to s. 8 of the Act, and eleven attempts to commit offences contrary to s. 24. The appellant pleaded guilty to the counts alleging attempts to commit offences contrary to s. 24 and was convicted and sentenced. He pleaded not guilty to the counts alleging attempts to commit offences contrary to s. 8 but was convicted after trial and sentenced to two months’ imprisonment on each count, a total of twenty-two months. He appealed to the High Court against conviction and sentence on the counts to which he had pleaded not guilty but his appeal was dismissed.

The facts very briefly are that seventy-eight envelopes were intercepted in the Post Office; all except one contained currency notes, the other containing a letter. All were addressed to K. H. Chandaria, 23 Nether Street, Tally Ho Corner, Finchley, London, N.12. A search was made at the business premises of

the appellant, where six envelopes similarly addressed were found containing currency notes and ten without contents. The appellant frankly admitted having addressed the envelopes which related to the charges, inserted the money and posted them or caused them to be posted.

Section 8 (1) of the Exchange Control Act reads as follows:

- “(1) Except with the permission of the Minister, no person resident in Kenya shall, subject to the provisions of this section, make any payment outside Kenya to or for the credit of a person resident outside the scheduled territories.”

It was not suggested that the permission of the Minister had been obtained or that the other provisions of the section had any relevance. The scheduled territories were defined by Legal Notice No. 158 of 1965 as being Kenya, Tanzania and Uganda. The appellant admitted that he was a resident of Kenya and the only question was, therefore, whether the addressee of the envelopes (to whom I shall refer as Khimchand) was a “person resident outside the scheduled territories”.

The prosecution sought to prove the residence of Khimchand by certain documents produced by an officer of the Immigration Department and by the letter seized by the police from the appellant. The learned trial magistrate held that the documents were admissible and his analysis of the facts is based to a substantial degree on material gleaned from them. The High Court on appeal held that they were inadmissible. The Republic gave notice of cross-appeal against that ruling and it will be convenient to dispose of that matter before going to the appeal itself.

It may be observed in passing that the rules of this court make no provision for cross-appeals in criminal appeals. We think, however, that it was clearly right to give notice to the court and to the appellant of the intention to raise this matter and it was immaterial whether it was formally done by notice or informally by letter.

The documents in question were forms which had been completed by Khimchand and his wife and delivered to the immigration authorities. They were kept in a file by the Immigration Department and were produced out of official custody. It was submitted by the prosecution that they constituted part of an official record and had been made by Khimchand and his wife “in performance of a duty specially enjoined by the law” of Kenya, so as to be admissible under s. 38 of the Evidence Act (No. 46 of 1963). It was never suggested that they were admissible on any other basis.

The learned judges of the High Court rejected this argument. They said:

“No difficulty arises over records made by public servants, but it does seem clear that when ‘any other persons’ are spoken of the legislature has not committed the absurdity of saying that every form which under some rule or regulation a citizen is required to complete before he can do this, or get that, becomes under this section evidence of the truth of the entries made, not only as against the maker, but also as against a person who has never seen or heard of the maker. The persons in contemplation of the legislature are surely persons who, though not public servants, are given the duty of keeping public or official books and records. We give as an example clergymen charged with the duty of keeping parish registers, but other examples can obviously be found.”

Section 38 was derived from s. 35 of the Indian Evidence Act, 1872, which it follows with only verbal alterations, and it is certainly wider than the law of England. Counsel for the Republic argued that we should not allow ourselves to be influenced by Indian decisions. The Indian Evidence Act dates back to 1872, when most of the forms that burden life today were unknown. The Kenya Evidence Act was enacted in 1963 and must be interpreted against a modern background. He argued that on a natural interpretation “any other person” would include Khimchand and his wife and he submitted that they

were under a duty imposed by the Immigration Regulations to complete these forms.

Counsel for the Republic argued that it is a mere matter of administrative convenience that members of the public are required to complete these forms: the regulations might equally well have required immigration officers to question travellers and record the answers in books. Such books, in counsel's submission, would be admissible under s. 38 and there is no logical reason why the forms which take their place should not also be admissible.

With respect, we cannot accept that argument. There is a great difference between forms completed by members of the public and records made by officials, in that an official will or should apply his judgment to what he records; he will make sure that the person he is interviewing understands the questions put to him and will challenge any reply which appears to be incorrect. As their Lordships of the Judicial Committee said in relation to s. 35 of the Indian Act, in *Lekraj Kuar v. Mahpal Singh* (1) ((1879) 5 Cal. at p. 754):

"Then when we find the statements are recorded and authenticated in the manner that has been mentioned, and placed in the Government records, ought it not to be implied that the officer has in effect affirmed that the information embodied in the recorded statements was true . . .?"

Again, we do not think that the interpretation which counsel would place on s. 38 gives any value to the use of the word "specially". Special is the reverse of general and when the statute speaks of persons acting in the performance of duties specially enjoined on them, it would seem that it is referring to duties which are imposed on particular individuals or the holders of particular offices or a particular class or category of persons: we do not think it can apply to duties which devolve in particular circumstances on every member of the general public.

Reading s. 38 as a whole, we think it is clear that "any other person" means any person, not a public servant, who finds himself under a specific duty to maintain or make entries in any record of a public or official nature. The learned judges of the High Court gave an example; others might be the secretaries or other officers of statutory boards and possibly of public corporations. We do not think it includes members of the general public completing forms necessary for their individual purposes, whether or not those forms will eventually form part of the archives of any Government department.

The cross-appeal raised a second matter which does not appear to have been argued in either of the lower courts. The learned judges in the High Court remarked in the course of their judgment:

"Yet we think that there was sufficient before the learned magistrate to justify his finding and though of course the onus never shifted to the appellant it may be noted that the appellant is a relative and business associate of Khimchand. He could, had Khimchand's sojourn in England been of a temporary nature only, have demonstrated that fact without much trouble."

Counsel for the Republic submitted that this was a case where s. 111 of the Evidence Act applied. That section, so far as is now relevant, reads:

"s. 111 (1) When a person is accused of any offence . . . the burden of proving any fact especially within the knowledge of such person is upon him."

Counsel's argument was that once the Republic had established a *prima facie* case that Khimchand was resident outside the scheduled territories, the burden

of proof shifted to the appellant. He relied on *R. v. Kakelo* (2); *Minister for Industry and Commerce v. Steele* (3) and *Mohamed Hassan Ismail v. R.* (4). In the first, the question in issue was whether or not the accused was an alien; in the second the question in issue was whether sausages made by the accused contained pork and, if so, in what proportion; in the third, the question in issue was whether the accused had a certificate entitling him to possess a firearm. Those were all questions which the accused persons could answer and probably no-one else. Once the prosecution had established a prima facie case, the onus therefore shifted. We think, however, that the position is essentially different here. In the cases cited, the accuseds' knowledge was knowledge of their own, personal, circumstances: one knew his own nationality, one the ingredients of the sausages he made and one whether or not he had obtained a firearms certificate. Here, we are being asked to say that a fact relating to someone else was especially within the knowledge of the appellant. The fact in issue was where Khimchand was resident; that fact could only be arrived at by inference from other, primary, facts and possibly, though not necessarily, from a knowledge of Khimchand's intentions. The appellant may have known, of his own knowledge, some of the primary facts from which residence could be inferred but it is impossible to be sure that he knew them all and he certainly could not know Khimchand's intentions. He might possibly think he knew all the primary facts and he might have received a statement from Khimchand purporting to set out his intentions but these could do no more than found a belief in the appellant's mind as to Khimchand's residence. It would not be a matter of knowledge and therefore s. 111 would not apply.

We would, therefore, reject both grounds of the cross-appeal.

Turning now to the appeal itself, the argument advanced by counsel for the appellant, may be summarized in this way. For the purposes of the Exchange Control Act, a person can have only one residence; Khimchand had been resident in Kenya; there was no evidence to show a change of residence; therefore, although the evidence showed that Khimchand was physically in England, it fell short of proving, to the standard required in criminal proceedings, that he had taken up residence there.

This argument depended very much on the interpretation to be given to the word "resident". Counsel for the appellant urged that the interpretation given in income tax cases is inappropriate and that a more appropriate interpretation is to be found in matrimonial proceedings.

Counsel for the Republic, on the other hand, argued that the Act contemplates dual residence; this is apparent from s. 26(1)(b)(ii), which refers to a person "resident in Kenya and not elsewhere" and s. 43(1), which provides that the personal representative of a deceased person is to be treated as resident where the deceased was resident at the time of his death "and as not resident elsewhere". He observed that there would be nothing novel in this, since dual residence is well recognized in income tax matters.

The learned magistrate considered at length the meaning of residence and he observed that:

"A person cannot be resident in more than one place at the same time under the Exchange Control Act."

He cited no authority for that statement and we are not aware of any authority for or against. In the High Court, the learned judges did not dissent from that view but amplified and explained it by saying that where a person maintains two residences, one in the scheduled territories and one outside, he will, for the purposes of the Act, at any particular moment be resident in the one where he

happens to be. Their Lordships went on to say that in their opinion the maintenance of an establishment might be very cogent evidence of residence but would not be conclusive.

With respect to learned counsel, we do not propose to discuss the cases cited to us. We think the only proper basis for deciding the meaning of residence for the purposes of the Act is an examination of the Act itself. We think that interpretations arrived at for other purposes are more likely to mislead than to help. On that basis, we find counsel for the Republic's argument irresistible. The Act restricts payments to persons resident outside the scheduled territories; it restricts the rights of persons resident in the scheduled territories; but where there is any qualification in favour of persons resident in the scheduled territories it is limited by the words "and not elsewhere". Section 16 is another example. We think that leaves no doubt that the Act recognizes dual residence.

That, we think, disposes of counsel for the appellant's main argument, because, if the Act recognizes dual residence, the fact that Khimchand may have been resident in Kenya for the purposes of the Act becomes immaterial, and there was no necessity for the prosecution to show any termination or suspension of that residence.

The second ground of appeal was that the learned judges of the High Court erred in law in holding that the admission by the learned magistrate of inadmissible evidence had not occasioned any failure of justice. The appellant's argument here was that if the inadmissible evidence were excluded, virtually nothing would be left: there would be no evidence when Khimchand left Kenya or when he arrived in England and no evidence whether he was living in London as a lodger or had set up a more or less permanent establishment. All that would be left would be the letter seized by the police, which read in isolation could only, in counsel for the appellant's submission, be bewildering.

Counsel for the Republic submitted that even if his cross-appeal were rejected, as we do reject it, there was still enough evidence to support the decisions of the lower courts. The letter seized by the police shows clearly that Khimchand was living in London with his wife and children; that he was carrying on business there and was considering buying a building.

We should perhaps remark that the letter is not evidence of any of these matters; it is only evidence that the appellant believed them to be facts. He was, however, only charged with attempting to commit offences against s. 8 and we think that he was clearly guilty of the attempt if he believed Khimchand to be resident in England, or believed in facts which would be sufficient to constitute residence, whatever the truth regarding those beliefs may have been.

We think it is always a matter of degree when physical presence amounts to residence for the purposes of the Act and we do not propose to attempt any definition. Our difficulty here is lack of evidence of almost all the factors on which a decision should be based.

In order to sustain the conviction of the appellant on the counts with which we are concerned, we must be satisfied that a court, wholly disregarding the inadmissible evidence, must inevitably, from a perusal of the somewhat obscure letter seized from the appellant, have reached the conclusion that Khimchand was, or was believed by the appellant to be, living in London with his family in circumstances amounting to more than a mere temporary visit. We think a court might reasonably have reached that conclusion but we do not feel that we can say that the opposite conclusion would have been unreasonable. If that is so, the admission of the inadmissible evidence has been highly prejudicial to the appellant, since it has deprived him of the possibility of an acquittal.

In those circumstances, we think this appeal must succeed. We accordingly quash the conviction of the appellant on the first, third, fifth, seventh, ninth,

eleventh, thirteenth, fifteenth, seventeenth, nineteenth, and twenty-first counts and set aside the terms of imprisonment imposed on those counts. The conviction and sentence on the other counts and the order of forfeiture are not affected.

Appeal allowed. Convictions and sentence in respect of the eleven counts set aside.

For the appellant:

Shah & Shah, Nairobi

E. F. N. Gratiaen, Q.C. (of the English Bar), *A. R. Kapila* and *Ramnik Shah*

For the respondent:

The Attorney-General, Kenya

K. Bechgaard, Q.C., and *J. B. Karugu* (State Attorney, Kenya)

Jupiter General Insurance Co v Kasanda Cotton Co [1966] 1 EA 252 (CAK)

Division:	Court of Appeal at Kampala
Date of judgment:	22 April 1966
Case Number:	42/1965
Before:	Sir Clement de Lestang VP, Spry and Law JJA
Sourced by:	LawAfrica
Appeal from:	The High Court of Uganda – Sir Udo Udoma, C.J.

[1] Insurance – Liability insurance for cash in transit – Oral contract on usual terms – Policy issued after period of cover because premium based on actual amount carried – Letter from insurer’s agent to insured confirming cover – Claim by insured that contract of insurance oral and unconditional – Whether usual terms and conditions binding.

Editor’s Summary

The respondent claimed indemnity under an oral contract of insurance with the appellant for loss of cash in transit during the 1962/63 cotton season of Shs. 64,273/79. In doing so it relied on a copy of a letter received from Oriental Agencies Ltd., agent of the appellant, informing the latter that they had covered the respondent against loss of cash in transit. The appellant admitted a contract of insurance but asserted that the contract was a written one, certain terms of which excluded liability, such as on the failure of the parties to refer a dispute to arbitration. Since the premium was based on the actual amount of cash carried during the period of cover and could not be calculated until that amount was known, it was a practice of the respondent not to issue a policy until after the expiration of the period of cover. For this reason no

policy relating to the 1962/63 season had been delivered to the respondent company at the time of the alleged loss. It was the case for the appellant that it had issued and delivered policies annually to the respondent since the cotton buying season 1958/59 and that these policies contained common form conditions; that the respondent knew those conditions or, in the alternative, had agreed to accept the usual conditions, and that the appellant had delivered a policy relating to the previous 1961/62 season on or about August 1, 1962. At the trial a preliminary issue was framed on whether the contract between the parties was oral or written. The learned Chief Justice found that a letter had been sent by the appellant's agent informing the respondent that the latter had been covered against loss of cash in transit for the 1962/63 season but that no policy had been delivered relating to the previous season of 1961/62, and further went on to hold that the contract of insurance was an oral one and that the appellant had accepted unconditionally to cover the respondent's cash in transit. He further held that neither party was reasonably bound or entitled to conclude from the attitude of the other that

written terms and conditions were intended. The appellant thereupon appealed and it was submitted that if an oral contract had been concluded, it must have been on the basis that a policy would in due course be issued on the usual terms and that those terms were therefore to be regarded as embodied in the oral agreement, or alternatively, there was no contract because the appellant's agent lacked authority to enter into an unconditional contract or because there was no consensus ad idem. On the other hand, it was argued on behalf of the respondent that the onus was on the appellant to show that the respondent knew the conditions of the policy and that, as they had failed to do so, the learned Chief Justice was correct in holding that the contract must be regarded as providing cover without conditions.

Held –

- (i) there was consensus ad idem for an oral contract of insurance between the parties on the terms and conditions usual to contracts for insurance of cash in transit, which was in due course to be embodied in the usual form of policy;
- (ii) it could not possibly be said that the terms of the contract were contained in the letter from Oriental Agencies Ltd. to the appellant, a copy of which was sent to the respondent;
- (iii) where a person has contracted for insurance on usual terms and conditions, it could not be said that he was not bound by any such terms and conditions until they have been made known to him; *Re Coleman's Depositories Ltd. and the Life and Health Assurance Association*, [1907] 2 K.B. 798. Explained.

Appeal allowed. Proceedings remitted to the High Court to proceed with the hearing on that basis.

Cases referred to in judgment:

- (1) *McCutcheon v. David MacBrayne Ltd.*, [1964] 1 All E.R. 430.
- (2) *Re Coleman's Depositories Ltd., and the Life and Health Assurance Association*, [1907] 2 K.B. 798.

The following judgments were read.

Judgment

Spry JA: This is an appeal from a judgment and preliminary decree of the High Court of Uganda. The respondent company (to which I shall refer as “Kasanda Cotton”) claimed to have been insured under a verbal contract by the appellant company (to which I shall refer as “Jupiter General”) against loss of cash in transit. It alleged a loss, covered by the contract, of Shs. 64,273/79 and claimed the right to be indemnified against that loss. Jupiter General denied liability: it admitted a contract of insurance but asserted that the contract was a written one, certain terms of which excluded liability in the particular circumstances. There was also a general denial that any loss had been sustained and the specific amount claimed was also challenged.

One of the terms of the alleged written contract was that any dispute between the parties should be referred to arbitration and accordingly when the suit came to trial a preliminary issue was framed, whether the contract between the parties was an oral or a written one. After hearing evidence and argument, which went considerably beyond the issue as framed, the learned Chief Justice held that the Jupiter General

“had accepted unconditionally to cover the plaintiff company’s cash-in-transit and did in fact cover the said cash-in-transit unconditionally at the time. The contract of insurance was therefore an oral one.”

A preliminary decree was extracted which merely provided that
“the said contract of insurance was an oral one.”

It is against that judgment and preliminary decree that the present appeal is brought.

The case for Jupiter General was that it had issued policies annually since the cotton buying season 1958/59 to Kasanda Cotton covering cash in transit and had delivered them to the company and that these policies contained common form conditions. From this it was claimed that during the period with which we are concerned, that is to say the 1962/63 season, Kasanda Cotton, while not in possession of a current policy, knew the conditions of the insurance or, in the alternative, had agreed to accept the usual conditions. The only issue of fact was whether or not a policy or policies had been delivered to Kasanda Cotton.

It may be remarked at this point that Jupiter General follow what seems a most peculiar practice in relation to policies insuring cash in transit. Because the premium is based on the actual amount of cash carried during the period of cover and therefore cannot be calculated until that amount is known, no policy is issued until after the expiration of the period of cover.

It was not in dispute that, as a result of this practice, no policy relating to the 1962/3 season had been delivered to Kasanda Cotton at the time of the alleged loss, but it was sought to be proved that a policy relating to the 1961/2 season had been delivered on or about August 1, 1962. On this question, there was a direct conflict of evidence. The learned Chief Justice found as fact that the policy had not been delivered to Kasanda Cotton. It was one of the grounds of appeal that in making this finding, the learned Chief Justice overlooked the evidence of an insurance assessor who testified that when he called at the Kampala office of Kasanda Cotton, the accountant to the company

“asked me whether I would like to see the previous policy covering cash in transit.”

It was submitted by counsel for Jupiter General, that this remark raised an irresistible inference that there was a policy in the possession of Kasanda Cotton. With respect, I cannot agree. The accountant may well have believed or assumed that there was a policy but his enquiry can have but little evidential weight in determining the question whether, as a matter of fact, there was a policy in the company's possession, particularly since the company's insurance business appears to have been handled by one of the directors. The only direct evidence on this question was that of one Babulal Rambhai Dave, an employee of a company known as Oriental Agencies, Ltd. (to which I shall refer as “Oriental Agencies”) which acted as agent for Jupiter General, who said that he had handed the 1961/2 policy to Raojibhai Ranchhodbhai Patel, a director of Kasanda Cotton. Raojibhai had earlier testified that no such document had ever been handed to him and he had not been cross-examined on that statement. The learned Chief Justice preferred the evidence of Raojibhai to that of Babulal and there is nothing in the record even to suggest that he was wrong in so doing.

No serious attempt was made to prove delivery to Kasanda Cotton of any policy insuring cash in transit for earlier years. Evidence was given by one Ambalal Maganlal Shah, a director of Oriental Agencies, of what he described as the usual practice in relation to the insurance of cash in transit, that after the amount of the premium had been ascertained, the information was sent to the Bombay office of Jupiter General, where a policy was prepared. It was then sent to Oriental Agencies in Kampala for signature. He went on:

“The usual practice with the Plaintiff Company was for us sometimes to send them the policies by messengers or they were handed over the policies in our office. I do not remember actually to whom the policy of the Plaintiff Company was given in any given year.”

Jupiter General was unable to produce any receipt for any of these policies, or any evidence of posting, or any signature in a despatch book to substantiate this vague evidence. In my view, the learned Chief Justice was, in these circumstances, fully justified in holding that it had not been proved that any policy covering cash in transit had been delivered to Kasanda Cotton. I think, too, that he was entitled to conclude that the contract of insurance for the 1962/63 season was an oral one.

That would have been enough to dispose of the preliminary issue as framed but as I have said, the evidence and the argument went beyond that issue and covered the further issue whether such oral contract was subject to conditions or was an unconditional contract of indemnity. This was an appropriate preliminary issue, because if the terms and conditions of Jupiter General’s usual policies were imported into the oral contract, the arbitration clause, as one of those conditions, would apply. The learned Chief Justice dealt with this issue, and decided that neither party was

“reasonably bound or entitled to conclude from the attitude of the other as known to it at the time that written terms and conditions were intended by the other party to form part of the contract.”

He based this decision largely on the fact that Kasanda Cotton had each year received a copy of a letter sent by Oriental Agencies to Jupiter General, informing the latter that the former had covered Kasanda Cotton against loss of cash in transit, and on evidence by one of the directors of Kasanda Cotton that he had enquired about a policy and been informed by a director of Oriental Agencies that the letter was

“as good as a policy”.

This finding was challenged by counsel for the appellant on two main grounds. In the first place, he submitted that if an oral contract had been concluded, it must have been on the basis that a policy would in due course be issued on the usual terms and that those terms were therefore to be regarded as embodied in the oral agreement; in the alternative, he argued that there was no contract, either because Oriental Agencies lacked authority to enter into a contract or because there was no consensus ad idem.

On the first of these grounds, counsel argued that it was inconceivable that an insurance company should enter into a contract giving unconditional indemnity. He pointed out that this had not been in contemplation even on the part of Kasanda Cotton, because the director of that company who normally dealt with such matters had said in evidence that when he arranged the insurance, he expected to receive a policy containing the usual terms and conditions, a policy similar to those issued to other companies taking out this kind of cover. The witness had said that he did not know what those terms and conditions would be, but counsel argued that this was immaterial, as there is no reason in law why a person should not agree to be bound by conditions which have not been communicated to him and of the contents of which he is unaware. (In this connection, he submitted that certain dicta in *McCutcheon v. David MacBrayne Ltd.* (1), are unduly wide.)

Counsel for the respondent argued, on the other hand, that the underlying principle behind all the English cases (it appears that there is no East African authority on the subject) is that if a person is not aware of the terms of one or

more conditions, he is not bound by them. He argued that the learned Chief Justice had, in effect, held that the letter a copy of which was sent by Oriental Agencies to Kasanda Cotton embodied the conditions of the contract and that, even though the director of Kasanda Cotton may originally have expected a policy containing conditions, the position was changed as soon as he was told that the letter was “as good as a policy”. He submitted that the onus was on Jupiter General to show that Kasanda Cotton knew the conditions of the policy and that, as they had failed to do so, the learned Chief Justice was correct in holding that the contract must be regarded as providing cover without conditions.

Counsel for the respondent relied largely on the English case of *Re Coleman’s Depositories, Ltd. and The Life and Health Assurance Association* (2), a case which the learned Chief Justice had said he found of assistance. That was a case where a policy of insurance against workmen’s compensation risks containing a condition that “immediate” notice be given of any happening giving rise to liability, was delivered to the insured after the occurrence of such a happening. Vaughan Williams, L.J., said that

“It could not have been in the contemplation of the parties that this condition as to immediate notice should apply until the contents of the policy had been communicated to the employer.”

As there was no evidence that the insured knew, or had the opportunity of knowing, the conditions of the policy, it was held that the condition as to immediate notice was not binding on him prior to its communication to him.

There has been, I think, some confusion of thought and a tendency to treat as one what are really two distinct questions: first, what was in fact the contract agreed between the parties and, secondly, whether any term of that contract is for any reason unenforceable. I do not, with respect, think that any of the cases cited to us has any bearing on the first of those questions, nor, indeed, is it likely that any other case would be of assistance in deciding what is essentially a matter of fact. On that question, there is evidence appearing on the record. As I have already said, a director of Kasanda Cotton, who negotiated the insurance, said quite frankly that he expected to receive a policy containing the conditions usual in respect of the particular risk. For Jupiter General, evidence was called which indicates that this was a risk which the company was accustomed to cover and for which it had a standard form of policy. It seems to me the irresistible conclusion that there was a consensus ad idem for a contract of insurance on the usual terms and conditions appropriate to the type of risk, which was, in due course, to be embodied in the usual form of policy.

I do not think it can possibly be said that the terms of the contract were contained in the letter from Oriental Agencies to Jupiter General, a copy of which was sent to Kasanda Cotton. As counsel for the appellant pointed out, the letter does not even refer to the amount of the premium or indicate the basis on which it was to be calculated.

Again, I do not think any significance is to be attached to the statement by a director of Oriental Agencies that the letter was “as good as” a policy. I do not consider that anything more is to be inferred from that remark than that Kasanda Cotton was in as good a position as if a policy had been issued. If that is the correct interpretation, the remark supports the case for Jupiter General, rather than that for Kasanda Cotton. I can see no justification for interpreting the remark as meaning that Kasanda Cotton was in an entirely different, and incidentally much more favourable, position than it would have been had it received a policy.

I think, therefore, with respect, that the learned Chief Justice erred in holding that neither party was “reasonably bound or entitled” to conclude that written terms were intended to form part of the contract.

It is not, of course, for this court at this stage to deal with the question whether any particular term or condition of the contract was binding on the parties in respect of the happening which gave rise to this suit, but it is necessary to deal with counsel for the respondent’s submission that none of the terms and conditions could have applied. This submission was based on the *Coleman’s Depositories* case (2). That decision is not binding on us, because the contract of insurance for the 1962/63 season was entered into before the coming into force on January 1, 1963, of the Contract Act, 1962, (No. 8 of 1962) and is therefore governed by the Indian Contract Act, 1872, as formerly applied to Uganda, but it has persuasive value. In his judgment, Vaughan Williams, L.J., after the passage I have quoted above, continued

“I hold that, on the face of the award there is no evidence that the employer knew or had the opportunity of knowing, the conditions of the policy, and that the onus is on the association; and in my opinion the risk undertaken by the association for the period prior to the delivery of the policy did not impose upon the employer the obligation to give immediate notice of the accident to Corrin on January 2, 1905, prior to the receipt by the employer of the policy or of information of its containing such a condition or obligation. The only question in this case is the obligation of this condition as to immediate notice . . .”

Counsel for the respondent stressed the use in this passage of the word “conditions” and argued, if I understood him aright, that the use of the plural meant that none of the conditions were applicable to the risk and therefore that there was cover without conditions. He submitted that the position in the present case was the same.

With respect, I cannot accept that contention. The last sentence of the passage I have quoted seems to me to indicate clearly that the learned Lord Justice was expressly limiting his remarks to the one condition with which he was concerned. This is equally clear from the judgment of Buckley, L.J. In my view, no general principle is to be extracted from the *Coleman’s Depositories* case (2), beyond the fact that a person will not be penalised for non-compliance with a condition as to the giving of notice of which he is not actually or constructively aware. As regards other conditions, such as conditions limiting the extent of the cover, I think very different considerations may apply. Be that as it may, I know of no authority for saying, and in the absence of authority I would not be prepared to hold, that where a person has contracted for insurance on usual terms and conditions, he is not bound by any such terms and conditions, until they have been made known to him.

It would, of course, not be proper for us to consider whether any particular term or condition of the contract between the parties is or is not enforceable or is or is not usual in such contracts, because these questions have not been argued or determined in the lower court. This includes the question whether or not the alleged arbitration clause applies.

I can, I think, deal briefly with the remaining grounds of appeal. I would reject counsel for the appellant’s submission that Oriental Agencies, as the agent of Jupiter General, lacked authority to enter on behalf of its principal, into any contract of insurance except possibly one on standard terms and conditions: the powers of an agent are in the first instance a matter of fact and there was no evidence whatever to show the scope of and the limitations on the authority of Oriental Agencies. In the absence of any evidence showing that

Oriental Agencies lacked express authority to make any particular kind of contract, no question of implied authority arises. Oriental Agencies was, unquestionably, the agent of Jupiter General; the former had for at least three years previously entered into similar contracts on behalf of the latter and those contracts had been ratified by the principal. It would be impossible for Jupiter General at this stage to deny the authority of its agent. Furthermore, this had not been pleaded, and I am by no means convinced that it was proper to argue it on appeal.

On the other hand, I would have been disposed to agree with counsel for the appellant's alternative argument, that there was no contract, for lack of consensus ad idem, if I were not convinced, as I have already said, that there was consensus ad idem for a contract on the usual terms and conditions. It would, in my view, be impossible, on the evidence, to hold that there had been consensus ad idem for an unconditional contract of indemnity.

For the reasons I have given, I would allow this appeal and set aside the judgment and preliminary decree of the High Court. I would substitute an order declaring, on the preliminary issue, that there was an oral contract of insurance between the parties, on the terms and conditions usual to contracts for insurance of cash in transit. I would remit the proceedings to the High Court to proceed with the hearing on that basis. I would award Jupiter General the costs of this appeal, with a certificate for two counsel. No order was made for costs in the High Court, and the costs in that court to date should, in my opinion, be costs in the cause.

Sir Clement de Lestang VP: I have had the advantage of reading the judgment of Spry, J.A. with which I agree. As Law, J.A., also agrees, there will be an order in the terms proposed.

Law JA: I also agree.

Appeal allowed. Proceedings remitted to the High Court to proceed with the hearing on that basis.

For the Appellant:

Wilkinson & Hunt, Kampala

P. J. Wilkinson, Q.C., and M. A. Patel

For the Respondent:

A. I. James and M. P. Vyas, Kampala

Mulji Jetha Ltd v Commissioner of Income Tax [1966] 1 EA 259 (HCK)

Division: High Court of Kenya at Nairobi

Date of judgment: 6 June 1966

Case Number: 55/1965

Before: Farrell J

Sourced by: LawAfrica

[1] Income tax – Notice appointing company an agent under s. 121 of the Income Tax (Management) Act, 1958, to pay a certain sum owed to taxpayer – Objection by taxpayer company on ground that moneys receivable as trustee.

[2] Income tax – Burden of proof – Notice under s. 121 of the Income Tax (Management) Act, 1958, to pay certain sum owed to taxpayer company – Objection by taxpayer on ground that money receivable as trustee – Claim by Income Tax authority that trust a sham – Instrument of trust produced in evidence – Whether taxpayer required to substantiate every recital in instrument – Shifting of onus of proof.

Editor's Summary

In 1960 the appellant acquired land as a trustee which it developed over two years and sold to Empire Investments, Ltd., as a result of which sale the latter company owed the appellant a sum in excess of Shs. 200,000/-. On January 28, 1962, the appellant had made a formal declaration of trust for named beneficiaries in respect of the land in question. The Commissioner of Income Tax issued a notice to Empire Investments, Ltd., under s. 121 of the Eastern Africa Income Tax (Management) Act, 1958, requiring it to pay him the sum of Shs. 200,000/- from the moneys payable by it to the appellant. It was not disputed that the appellant in its personal capacity owed the respondent a sum greatly in excess of this amount for arrears of tax, but it was contended that the notice was improper and illegal because the appellant was entitled to the money as trustee and not in its personal capacity. The Trust deed recited the transfer of the plot of land to the appellant and went on to recite that the purchase price of the land was provided by or on behalf of certain beneficiaries, who were for the most part directors and shareholders in the appellant company or persons related to them. The instrument also declared that the appellant held the land in trust for the beneficiaries and that on request it would transfer the land to them. It was contended on behalf of the respondent that the alleged declaration of trust was a mere sham, that the appellant's purpose in making the declaration was to put a valuable property belonging to the appellant out of the reach of the respondent, and the trust was attacked on the grounds that (a) it was invalid since it contained an undertaking to transfer the property to the beneficiaries on request and under condition 10 of the grant any transfer was forbidden without prior consent of the Commissioner of Lands, (b) the appellant had not shown how or to what extent the purchase price of the land was provided by or on behalf of the beneficiaries, (c) the trust was ultra vires the directors and the company. At the trial the sole issue was whether the appellant was a trustee and it was further conceded that the onus of proof rested upon the appellant.

Held –

- (i) though transfer of the land was forbidden without prior consent of the Commissioner of Lands, there was nothing to prevent the appellant from applying for such consent if the request had been made and this was no ground for impugning the validity of the instrument;
- (ii) though the evidence on the question of how or to what extent the purchase price was provided was vague and unsatisfactory, the instrument spoke for itself;
- (iii) it was not incumbent on the appellant to establish by detailed evidence of the truth of any part of the recitals of the declaration of trust:

- (iv) once the appellant had produced the trust instrument, it was for the respondent to show grounds for treating it as invalid, and this he had failed to do.

Declaration that the appellant was a trustee and that the notice was illegal.

No cases referred to in judgment.

Judgment

Farrell J: This is an appeal by the taxpayer company against the decision of the respondent, the Commissioner of Income Tax, in issuing a notice dated January 25, 1965, to Empire Investments, Ltd., under s. 121 of the Eastern Africa Income Tax (Management) Act, 1958 (hereinafter referred to as “the Act”), appointing it the agent of the appellant and requiring it to pay to the respondent the sum of Shs. 200,000/- from the moneys payable by it to the appellant. The sole ground of the appeal is that the notice is improper and illegal for the reason that the appellant is entitled to certain moneys from the said Empire Investments, Ltd., in its capacity as trustee and not in its personal capacity.

It was conceded by counsel for the respondent that if the sum in question is due to the appellant in its capacity as a trustee the notice is unenforceable and the appellant is entitled to succeed on the appeal. The sole issue in these proceedings is whether the appellant is a trustee and the money the subject of the notice is owed to it in its capacity as such.

It is further conceded that the onus of proof rests upon the appellant.

The appellant was duly incorporated as a limited liability company in 1942, and in 1960 acquired a plot of land and developed it with the aid of a loan from Credit Finance Corporation, Ltd. The property, known as “Commerce House, Nairobi”, on completion was let to a number of tenants. In 1962 the appellant sold the property to Empire Investments, Ltd. As a result of the transaction of sale a sum in excess of Shs. 200,000/- is owed by Empire Investments, Ltd., to the appellant, and this is the sum in respect of which the notice was issued which is the subject of this appeal. It is not disputed that the appellant owes to the respondent a sum greatly in excess of this amount in respect of arrears of tax.

On January 29, 1962, the appellant made a formal declaration of trust in respect of the plot of land in question, and this is the document on which the appellant primarily relies in these proceedings. The declaration recites the transfer to the appellant of the plot of land and goes on to recite that “the purchase price of the said piece of land was provided by or on behalf of ‘certain named beneficiaries’”. The instrument then declares that the appellant holds the land in trust for the beneficiaries in specified proportions, and finally declares that on request of the beneficiaries it will transfer the land to them. It is not disputed that the beneficiaries are for the most part directors and shareholders in the appellant company or persons related to them.

It is the case for the respondent that the alleged declaration of trust is a mere sham, and that the appellant’s purpose in making the declaration was to put a valuable property belonging to the appellant out of the reach of the Income Tax Department.

I think, without so deciding, that the main purpose of the declaration may well have been to put the property out of the reach of the respondent. That, however, does not necessarily avoid the transaction. The question is whether or not the appellant has succeeded in his purpose. If the transaction is otherwise

indefeasible, it cannot be brushed aside merely because its purpose is to avoid the payment of tax. In this connection it has been suggested that the respondent's

remedy, if any, was to be found in s. 23 of the Act. But that section is concerned with transactions designed to avoid liability to tax, and empowers the Commissioner to make appropriate adjustments in assessments so as to counteract the effect of such transactions. Here the transaction, on the view I have tentatively taken, is not to avoid or reduce liability, but to prevent the realisation of tax admittedly due, and the Act gives no specific remedy in such a case.

If it is in any way relevant in these proceedings to mention other steps which might have been taken by the respondent, it may be suggested that if winding up proceedings had been commenced at an appropriate time, he might have availed himself of the provisions of s. 312 of the Companies Act (Cap. 486), under which certain dealings with a company's property, which might otherwise be perfectly valid, are avoided as fraudulent preferences. The provision is perhaps worth mentioning simply for the purpose of pointing out that there is no corresponding provision in the Income Tax (Management) Act which has the effect of avoiding an otherwise valid transaction on the ground that it removes the taxpayer's property from the reach of the Commissioner of Income Tax.

No doubt conscious of this difficulty counsel for the respondent has sought to show that the declaration of trust was not a valid and lawful act. Counsel for the appellant has pointed out that the document complies in every respect with the requirements of law and no attack has been made upon it for lack of form. But it is first of all objected that the transaction required to be registered under s. 99 of the Crown Lands Act (Cap. 280). To this it is answered that the grant was originally made under the Registration of Titles Ordinance (as it then was) and that the requirements of registration are to be looked for now in the Registration of Titles Act (Cap. 281). Under s. 80 of that Act trusts and trust instruments are not registrable. I find there is no substance in the first objection.

It is next argued that the declaration of trust is invalid since it contains an undertaking to transfer the property to the beneficiaries on request, and under condition 10 of the grant transfer is forbidden without prior consent of the Commissioner of Lands. There was however nothing to prevent the appellant from applying for such consent if the request had been made, and this is no ground for impugning the validity of the document.

Next it is pointed out that the declaration of trust recites that the purchase price of the land was provided by or on behalf of the beneficiaries, and that the appellant has not shown how or to what extent this was done. I agree that the evidence on this point was vague and unsatisfactory: but does failure to prove the truth of the recitals in an instrument affect the operation of the instrument itself? I know of no authority for such a proposition. Ordinarily an instrument speaks for itself, and it is unnecessary and improper to go behind the terms of the instrument. If consideration were necessary for the validity of a declaration of trust it might be permissible to show the absence of consideration (see proviso (1) to s. 98 of the Evidence Act): but that is not the case here, and I hold that it was not incumbent on the appellant to establish by detailed evidence the truth of any part of the recitals of the declaration of trust.

Next, it is said that the directors had no authority to enter into the alleged transaction. The witness for the appellant has produced a minute of a directors' meeting dated September 9, 1958, which records a resolution that the company shall act as trustee of the property. This does not carry the matter much further, except as showing (if the minute is genuine) that the trust was contemplated as early as 1958. It is not a resolution of the company in general meeting. But ordinarily directors are entrusted with the management of a company, and require no special authority for their acts except in so far as by the Act or regulations such acts are required to be done by the company in general meeting.

Finally, it was submitted by counsel for the respondent in his closing speech that it has not been shown whether the articles empower the company to create trusts. In so far as the articles are a contract between the members of a company, they are perhaps less important than the memorandum of association. But in either case the submission is that the declaration was ultra vires the directors and the company, and as such is of no effect. It is possible that this may be the case, but as neither side has thought fit to put the memorandum and articles in evidence, how can the court decide? In the circumstances the issue must be decided solely in accordance with the onus of proof. As I have mentioned the appellant accepts that the general onus in this appeal rests on him. He has sought to discharge that onus by showing that the debt due to the appellant is due to it as trustee, and for this purpose it has produced a document entitled a declaration of trust which on its face is perfectly valid. Is it required to do more? It is implicit in the argument of counsel for the respondent that the appellant should go further and show that the declaration of trust was within the powers conferred by the memorandum and articles. It can be argued to the contrary, that while the overall burden of proof is on the appellant, once it has produced what on its face is a valid and regular declaration of trust the presumptive or provisional burden of proof shifts to the respondent to show that the declaration is ineffective. This the respondent has failed to do and so the appellant should succeed.

The question is not altogether easy to decide, but in my view the second view is the correct one. It is commonplace that within a general burden of proof, the burden of adducing evidence or however it may be called may shift first one way and then another, and that seems to me to be the case here. Once the appellant had produced the declaration it was for the respondent to show grounds for treating it as invalid. The respondent having failed to do so, the declaration stands. The appellant has discharged the overall burden of proof, and the appeal accordingly succeeds.

There will be an order as prayed, and the costs of these proceedings will be paid by the respondent.

Declaration that the appellant was a trustee and that the notice was illegal.

For the appellant:

B. C. Syal, Nairobi

K. Bechgaard, Q.C., and *B. C. Syal*

For the respondent:

The Legal Secretary, E.A.C.S.O.

S. M. Otieno (Assistant Legal Secretary, E.A. Common Services Organisation)

Ujagar Singh v Runda Coffee Estates, Ltd
[1966] 1 EA 263 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	6 April 1966
Case Number:	3/1966
Before:	Newbold P, Sir Clement de Lestang Ag VP and Spry JA

[1] *Appeal – Jurisdiction – Stay of execution – Notice of appeal filed by respondent – Application for stay of execution – Whether court has jurisdiction to hear application – Whether the word “appeal” in r. 53 of Eastern Africa Court of Appeal Rules, 1954, includes notice of appeal.*

Editor’s Summary

The respondent had obtained an order for possession against the applicant in the High Court of Kenya of a building erected on the respondent’s estate by the applicant’s deceased father. It was a term of the order that the respondent pay compensation into court, which was complied with, and thereafter the respondent filed a notice of appeal against the order for compensation. The applicant did not file a notice of appeal but after having applied twice unsuccessfully to the High Court for a stay of execution of the order for possession, filed a similar application in the Court of Appeal. This application was heard by a single judge in the first instance, who granted it but, on the application of the respondent, referred it to the full court. It was contended by counsel for the respondent that the application for a stay in the Court of Appeal was incompetent for two reasons, namely (a) that there was no appeal pending yet since only a notice of appeal had been filed, and (b) that as the appellant had not himself given notice of appeal he could not apply for a stay.

Held (Newbold, P., dissenting) –

- (i) the word “appeal” in r. 53 of the Eastern Africa Court of Appeal Rules, 1954, is used to describe the procedure started by filing a notice of appeal;
- (ii) since there could be no doubt that the High Court had power to order a stay of execution either in the exercise of its inherent jurisdiction or under O. XLI, r. 4, Civil Procedure (Revised) Rules, 1948, it followed that a like jurisdiction was conferred on the Court of Appeal by s. 3 (2) of the Appellate Jurisdiction Act, 1962;
- (iii) the Court of Appeal was empowered to entertain an application for a stay of execution as soon as the notice of appeal had been filed: *Vallabhdas Kassandas Raniga v. Mansukhlal Jivraj & Others*, [1965] E.A. 700 (C.A.) followed; *Motel Schweitzer v. Thomas Edward Cunningham & Others* (1955), 22 E.A.C.A. 252 and *Adam v. I.T. Comr.*, [1964] E.A. 401 (C.A.) disapproved;
- (iv) it was immaterial which party filed the notice; if, however, a notice of appeal was filed against part only of a judgment or decree and the stay applied for related to a different part of the judgment or decree, it would be desirable that a notice of cross-appeal relating to that part be filed before or simultaneously with the application for stay.

Application refused on its merits.

Cases referred to in judgment:

- (1) *Motel Schweitzer v. Thomas Edward Cunningham & Others* (1955), 22 E.A.C.A. 252.
- (2) *Vallabhdas Kassandas Raniga v. Mansukhlal Jivraj & Others*, [1965] E.A. 700 (C.A.).
- (3) *Adam v. I.T. Comr.*, [1964] E.A. 401 (C.A.).

The following judgments were read:

Judgment

Sir Clement De Lestang Ag VP: This is a reference to the Court of a decision of a single judge of the court in the matter of an application for a stay of execution. It arises in the following circumstances. The respondent, the owner of an estate on which there is a building occupied by the applicant, brought an action in the High Court of Kenya to recover possession of the building. The applicant refused to give up possession unless he was paid compensation. The High Court ordered the applicant to put the respondent in possession within ten days of being notified by the respondent's advocates of the deposit by the respondent with them of the sum of Shs. 27,000/- which, subject to any order which this court might make on an appeal, the High Court directed should be paid by way of compensation to the estate of Cheta Ram, the applicant's father. The respondent deposited the money and the applicant though duly notified of the deposit has not put the respondent in possession. Meanwhile the respondent filed a notice of appeal against the decision of the High Court ordering them to pay compensation. The applicant has not filed any notice of appeal but twice applied unsuccessfully to the High Court for a stay of execution. Eventually, he filed an application in this court for a stay of the High Court decree "pending the result of the intended appeal by the respondent". The application was heard by a single judge of this court (Law, J.A.) who granted it but, on the application of the respondent, referred it to this court in accordance with the provisions of s. 3B of the Court of Appeal for Eastern Africa Act, 1952 (of the Common Services Authority) and r. 19 (6) of East African Court of Appeal Rules, 1954.

At the hearing before us counsel, for the respondent, contended that the application for a stay was incompetent for two reasons, namely, (a) that there was no appeal pending yet in this court since only a notice of appeal had been filed and, (b) that as the applicant had not himself given notice of appeal he could not apply for a stay.

I will deal with (b) first as I think it can be disposed of in a few words. If (which I will assume for the moment) the filing of the notice of appeal gives the court jurisdiction to entertain an application for stay pending an appeal it is immaterial in my view which party filed the notice. The court is as it were seized of the matter and either party may make such applications to it as it is competent to entertain. I would, however, observe that when a notice of appeal is against part only of a judgment or decree and the stay applied for relates to a different part of the judgment or decree, I think it desirable that a notice of cross-appeal relating to that part be filed before or simultaneously with the application for stay.

As regards (a) the question of a stay pending appeal is regulated by r. 53 of the rules of this court which is in the following terms:

"An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from unless the court below or the court or a judge so orders and no intermediate act or proceeding shall be invalidated except so far as the court may direct."

It is clear from this rule that there must be "an appeal" before this court may entertain an application for a stay. When therefore is there an appeal within the meaning of the rule? The right of appeal itself is conferred by the municipal law which, in the case of Kenya, is the Appellate Jurisdiction Act, 1962. The rules of this court prescribe the procedure which the litigant who desires to appeal, whether with or without leave, must follow. The first step is to file a notice of appeal within 14 days of the decision complained of (r. 54). That notice must be

substantially in the prescribed form which although headed “notice of appeal” expressly states that it is a notice of intention to appeal. The notice of appeal is filed in the court from which the appeal emanates and a copy thereof forwarded to the Registrar of this court. It is served on all parties directly affected by the appeal who thereby become respondents to an intended appeal and must within a specified time “file with the proceedings from which the appeal arises and served on the appellant notice of a full and sufficient address for service . . .” (r. 57 (2)). The use of the word appellant is significant. The next step is lodging the appeal and the relevant rules are rr. 58 and 59.

- “58. *Lodging appeal.* Subject to any extension of time and to any order made under r. 82 of these Rules, the appellant shall within sixty days after filing notice of appeal lodge the appeal by filing in the Registry of the Court four copies of the record of appeal, paying the prescribed fee and lodging in Court the sum of fifteen hundred shillings as security for the costs of the appeal.”
- “59. *Default in lodging appeal.* If the appeal be not lodged as aforesaid the notice of appeal shall be deemed to have been withdrawn, and the appellant shall pay the respondent the costs of the abortive appeal.”

The former rule was considered in *Motel Schweitzer v. Cunningham & Others* (1), in which the court said that “the notice (of appeal) is a document filed in the proceedings of the Superior Court and in no case is the appeal instituted until the record of appeal is lodged in the Registry of this court, the prescribed fees paid and security lodged as provided in r. 58”. With this statement I respectfully agree. I would, however, point out that that case did not concern a stay of execution but whether the omission of the appellant to extract the decree following the judgment of the court below before the lodgment of the appeal, as required by r. 56, affected the right of appeal. The court held that it did not, and that it was merely a breach of procedure which was rectifiable in the circumstances of the case. It was not necessary for the court to consider r. 53 and it made no reference to it at all.

As to the meaning of that rule there is a conflict of judicial opinion. In *Vallabhdas Kassandas Raniga v. Mansukhlal Jivraj & Others* (2), an application was made to a single judge for a stay of execution pending appeal after the appellant had given notice of appeal but before the appeal had been lodged. The application was resisted on the ground that as the appeal had not been lodged there was no appeal and the court had no jurisdiction to entertain the application. Gould, Ag. V.-P., after an exhaustive examination of the rules held that for the purpose of r. 53 there was an appeal as soon as the notice of appeal had been given. He called attention to the long delay in the preparation of the records of appeal and pointed out that if an intended appellant had to wait until the record was lodged to apply to this court for a stay irreparable harm may be caused to him. He analysed various rules and concluded.

“Having regard to the object of the rule I do not think that the phrase ‘an appeal’ was intended to be limited to an instituted appeal, but had regard to the whole concept of an appeal from its preparatory stage to its due determination. It cannot be said that nothing happens before the institution of the appeal (the actual words of r. 58 are ‘lodge the appeal’) for the preparatory step of notice is something which is prescribed by the rules of this court. Then the appellant must prepare a record and when he files it and gives security within the permitted period the appeal is ‘lodged’. Rule 59 is of interest:

- ‘59. If the appeal be not lodged as aforesaid the notice of appeal shall be deemed to have been withdrawn, and the appellant shall pay the respondent the costs of the abortive appeal.’

There the framers of the rule used the word 'appeal' though it was never lodged, coupled with an adjective implying that it was something which had existence though it came to nothing.

In my judgment r. 53 deals with the concept of an appeal as a whole, including all steps provided by the Rules of this court, and ought not to be limited to the narrower meaning involved in regarding an appeal as something which cannot form the basis of a court order until it is lodged formally. If I am right, there is jurisdiction to order a stay in contemplation of the lodging of the record, at any time, at least after the filing of the notice of appeal, though the court may well require assurance of the due prosecution of the appeal when application is made before the security under r. 58 has been provided."

The same point was also considered by a single judge in *Adam v. I.T. Comr.* (3). Unfortunately *Raniga's* case (2) was not referred to in that case and Crabbe, J.A., relying entirely on the passage in *Motel Schweitzer's* case (1) which I have quoted held that as the appeal had not been lodged there was no appeal pending and consequently the application for stay was incompetent.

With respect I prefer the reasoning of Gould, Ag. V.-P., to that of Crabbe, J.A. It is only fair that an intended appellant who has filed a notice of appeal should be able to apply for a stay of execution to the court which is going to hear the appeal as soon as possible and not have to wait until he has lodged his appeal to do so. Owing to the long delay in obtaining the proceedings of the High Court it may be many months before he could lodge his appeal. In the meantime, the execution of the decision of the court below could cause him irreparable loss.

There are, I think three other reasons why the word "appeal" must be given a wide meaning in r. 53. The first is this. Order XLI, r. 4 of the Rules of the High Court provides that no appeal shall operate as a stay of execution except in so far as the court appealed from may order and whether a stay is granted or not by the court, the court to which the appeal is preferred shall be at liberty on application being made, to consider such application and to make such order thereon as may seem just . . . That rule contemplates that an appeal must be in being before an application for stay can be entertained by the court appealed from. An appeal either exists or it does not. It cannot exist in so far as the court appealed from is concerned but not in regard to the court of appeal. It is customary for applications for stay to be made, to the court appealed from at any rate, as soon as the notice of appeal is given. If this practice is right (which I have no reason to doubt) and there is accordingly an appeal for the purpose at least of enabling the court appealed from to entertain an application for stay there must equally be an appeal for a similar purpose in regard to the court of appeal.

There is nothing in the High Court Rules to suggest that an appeal means only an appeal lodged in this court. If it has such a meaning a litigant desirous of appealing would be unable under the rules (though not under the inherent powers of this court) to obtain a stay either in the court appealed from or in the court of appeal until several months after the decision. I doubt if such an odd result was contemplated by the framers of the rules.

The second reason results from s. 3 (2) of the Appellate Jurisdiction Act, 1962, which provides that:

"For all purposes of and incidental to the hearing and determination of any appeal in the exercise of the jurisdiction conferred by this Ordinance, the Court of Appeal shall have, in addition to any other power, authority and jurisdiction conferred by this Ordinance, the power, authority and jurisdiction vested in the court from which the appeal is brought."

Since there can be no doubt that the High Court has power to order a stay of execution either in the exercise of its inherent jurisdiction or under O. XLI, r. 4, it follows that a like jurisdiction is conferred on this court by the section above quoted.

The third reason is that the definition of a pending appeal in r. 19 (9) of the East African Court of Appeal Rules is expressly confined to that rule, a rule relating to a procedural matter. This in itself would tend to suggest that the word appeal may well be used elsewhere in the rules in a different sense.

For these reasons I am of the opinion that this court is empowered to entertain an application for stay as soon as the notice of appeal has been filed.

That being so I must now deal with the application on its merits. While it seems that the applicant and his predecessor have been in occupation of the building for the past 45 years it was never in dispute before the High Court that the respondent was entitled to possession, his claim being restricted to one for compensation. The position now is that an order for possession has been made which is not subject to appeal. Therefore whatever the result of the appeal the order for possession will stand. It appears from his affidavit however, that while the applicant is not disputing the respondent's right to possession he is contending that the period of ten days from the deposit of the compensation within which he is required to vacate the premises is unreasonably short and this is a matter which he could raise by notice of cross-appeal, the time for which does not expire until seven days after the service on him of the record of appeal. But three months have now elapsed since that order was made and in the circumstances I can see no reason for the stay of the order. I would discharge the order made by Law, J.A., and direct the applicant to pay both the costs of the application before Law, J.A., and of the reference to this court.

Spry JA: I have had the advantage of reading the judgment of De Lestang, Ag. V.-P., and I agree with the order that he has proposed.

As the question whether this court has jurisdiction to order a stay of execution of a decree after notice of appeal has been given but before the memorandum of appeal has been filed is one of difficulty and has led to conflicting decisions of this court, I think I should add some observations on that aspect of the matter.

I think it is necessary first to look at the source of jurisdiction, that is, so far as Kenya is concerned, the Appellate Jurisdiction Act, 1962 (No. 38 of 1962), to see what jurisdiction has been conferred on the court, and then to look at the rules of this court to see if the exercise of that jurisdiction has been limited.

Section 3 (2) of the Appellate Jurisdiction Act, 1962, provides that:

“For all purposes of and incidental to the hearing and determination of any appeal in the exercise of the jurisdiction conferred by this Act, the Court of Appeal shall have, in addition to any other power, authority and jurisdiction conferred by this Act, the power, authority and jurisdiction vested in the court from which the appeal is brought.”

That provision is substantially similar to the relevant part of s. 16 (1) of the Eastern African Court of Appeal Order in Council, 1950, which formerly applied, and which provided that, subject to the provisions of the Order or of any law for the time being in force:

“for all purposes of and incidental to the hearing and determination of any appeal within its jurisdiction, the Court shall have the power, authority and jurisdiction vested in the Court from which the appeal is brought.”

Those words follow, with only a minor verbal variation, the corresponding words in s. 3 of the Eastern African Court of Appeal Order in Council, 1921. I do

not think it can seriously be doubted that they are derived from s. 19 of the Supreme Court of Judicature Act, 1873, of England, the relevant part of which reads:

“For all purposes of and incidental to the hearing and determination of any Appeal within its jurisdiction . . . the said Court of Appeal shall have all the power, authority and jurisdiction by this Act vested in the High Court of Justice.”

which was later replaced in England in almost identical terms by s. 27 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925.

The relevant provision in the Eastern African Court of Appeal Rules, 1954 (which were saved by the Appellate Jurisdiction Act, 1962) is r. 53, which reads:

“An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from unless the court below or the court or a judge so orders . . .”

This substantially follows r. 27 of the former Eastern African Court of Appeal Rules, 1925.

Rule 53 is almost identical in its terms with, and is clearly derived from, O. 58, r. 16 of the Rules of the Supreme Court, 1883, of England, which reads:

“An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from, except so far as the court appealed from, or any judge thereof, or the Court of Appeal, may order . . .”

(That rule is now replaced, without material alteration, by O. 58, r. 12 (1962 Revision).)

It may also be noted that r. 52 of the Eastern African Court of Appeal Rules, 1954, provides, in relation to first appeals in civil matters, that in any case for which the rules do not provide, the practice and procedure of the Court of Appeal in England shall be followed as nearly as may be.

Against this background, I think that English practice and procedure must have a high persuasive value in the interpretation of the Appellate Jurisdiction Act, 1962, and the Eastern African Court of Appeal Rules, 1954. It may be noted from the Annual Practice for 1946-47 that at that time the view appears to have been held, based on an unreported case, that the Court of Appeal in England had no jurisdiction to entertain an application for a stay of execution pending appeal until the appeal had been entered. In 1947, however, a Practice Note was issued by Greene, M.R., in which, after prescribing the proper form for such applications, the Master of the Rolls went on to say that applications for a stay would not be entertained in cases in which an appeal had not been entered except on certain undertakings, thereby clearly implying that the court had jurisdiction to entertain applications before the entry of the appeals. Such a Practice Note has, of course, no statutory authority but commands respect as an expression of the views of the judges and this particular Practice Note has remained unchanged and apparently unchallenged for nearly twenty years.

It is true that there is a difference of procedure between England and East Africa, in that in England the notice of appeal is by notice of motion and a copy of it takes the place of the memorandum of appeal in East Africa, but in each case there are the two stages of notice of appeal and entry or filing and I do not think that the Court of Appeal in England can any more be said to be seized of an appeal before entry than is this court before filing.

These considerations would incline me strongly to follow the English interpretation. As De Lestang, Ag. V.-P., has observed, there are conflicting decisions

of this court in *Raniga v. Jivraj* (2) (1965) E.A. 700 (C.A.) and *Adam v. I.T. Comr.* (3). The decision in the latter case was based on the decision in *Motel Schweitzer v. Cunningham* (1), but with respect I do not consider that decision of any assistance, since the court was then interpreting a different rule (r. 56), to which different considerations apply.

Turning now to the actual wording of the relevant enactments, I think that the words “all purposes of and incidental to the hearing and determination of any appeal” in the Appellate Jurisdiction Act, 1962, must include applications for stay of execution, because otherwise this court could order a stay and there may well be cases where an appeal is liable to be rendered abortive if a stay is not ordered and the stay is therefore incidental to the appeal, and I think “appeal” must include an intended appeal, if only to cover applications for leave to appeal and applications for extension of time. As the High Court undoubtedly has power to order a stay of execution, I think s. 3 (2) of the Appellate Jurisdiction Act, 1962, confers a like jurisdiction on this court.

There remains the question whether r. 53 of the Eastern African Court of Appeal Rules, 1954, limits the exercise of that jurisdiction. Certainly it does not do so expressly and the only question is whether it does so by necessary inference. In my view, it does not. The rule is essentially negative, its direct provision being that an appeal shall not, of itself, operate as a stay of execution although this is then qualified by a reference to the power of the High Court or this court or a judge of this court otherwise to order. It does not say that such an order shall only be made in the appeal itself, as distinct from an order on a preliminary application after notice of intention to appeal. If, therefore, as I think, jurisdiction is conferred by the Appellate Jurisdiction Act, 1962, I cannot see that there is anything in r. 53 to restrict the exercise of it.

Newbold P: The applicant was the defendant in a suit in the High Court in which the plaintiff, the respondent to the application, sought an order for possession of certain premises. The right of the respondent to possession was not in dispute and the High Court made an order for possession subject to the payment in a specified manner of compensation in respect of a building erected on the premises by the applicant's deceased father. The respondent paid in the specified manner the amount of compensation ordered and gave notice of appeal against the order for compensation. The applicant applied to the trial judge for a stay of execution of the order for possession. This was refused. He applied again to another judge of the High Court and his application was again refused. He then applied to a single judge of this court, Law, J.A., and his application was granted. The respondent then asked that the decision of Law, J.A. be referred to the full court and accordingly the matter came before us. This reference raises the question of the jurisdiction of this court to entertain an application for the stay of execution of a judgment of the High Court of Kenya where the application is made after notice of appeal has been given but before the appeal is lodged.

Under r. 53 of the Eastern African Court of Appeal Rules, 1954, “an appeal shall not operate as a stay of execution or of proceedings under the decision appealed from unless the court below or the court or a judge so orders . . .”. Under r. 54 “any person desiring to appeal to the court . . . shall give notice of appeal . . .” and “the notice of appeal shall be intitled in the proceedings from which it is intended to appeal . . .” and is filed with the Registrar of the court from which the appeal is to be brought and the registrar of that court forwards a copy to the registrar of this court. Under para. (6) of this rule “where an appeal lies only with leave it shall not be necessary to obtain such leave to appeal before filing notice of appeal”. Under r. 56 where the intended appeal is against a decree or order it is not necessary that the decree or order be extracted before notice of appeal is filed. Under r. 57 where a person is

served with a notice of appeal he is required to file in the proceedings of the court from which the appeal is to be brought, an address for service. Under r. 58 “the appellant shall within sixty days after filing notice of appeal lodge the appeal by filing in the Registry of the court four copies of the record of appeal, paying the prescribed fee and lodging in court the sum of fifteen hundred shillings as security for the costs of the appeal”. Under r. 19 provision is made for applications to the court and to a single judge thereof and it is provided in para. (9) that “if an appeal is pending, any application made in connection therewith shall be intitled in the appeal” but that “if no appeal is pending, an application shall be intitled as a . . . civil application . . . in the matter of the intended appeal . . .” and that “for the purpose of this rule an appeal shall not be deemed to be pending until it has been duly entered in the register of the court”.

While there is some uncertainty in the wordings of these Rules between an appeal and an intended appeal and between an appellant and an intended appellant, I consider that the Rules make it quite clear that until an appeal is lodged it cannot be said that there is any appeal before this court which would give it jurisdiction to interfere in any way whatsoever with the decision from which the appeal is to be brought. This is in accord with s. 3 (2) of the Appellate Jurisdiction Act, 1962, of Kenya, which confers on this court jurisdiction “For all purposes of and incidental to the hearing and determination of any appeal . . .”. This section gives jurisdiction in relation to matters preparatory to the appeal, such as an extension of time for lodging an appeal, but it gives no jurisdiction in relation to the decision appealed from until the appeal is lodged. Rule 53 of the Rules in providing that an appeal shall not operate as a stay of execution unless the court so orders means, in my view, quite clearly what it says, that is, it is dealing with an appeal and not with a notice of appeal. This rule falls within the same Part as r. 58 which in effect defines an appeal as the lodgment of the record, the payment of the fees and the lodgment of the security. I see absolutely no reason whatsoever to regard the word “appeal” in r. 53 as including proceedings in another court preliminary to possible proceedings in this court. Indeed it would be contrary to the general practice of the courts and contrary to the whole tenor of the Rules so to construe that word.

For this court to assume a jurisdiction to stay the execution of a decision of the High Court before an appeal is lodged would have the extraordinary result, where an appeal only lies with leave and leave is not granted, of enabling this court to stay the execution of a decision from which no appeal lies to this court. Such a position would be manifestly wrong. It may be urged that if the word “appeal” in r. 53 means appeal proceedings in this court and not proceedings preliminary thereto then, as the Court of Appeal is seized of the proceedings, why should provision be made in the rule whereby the court below may order that the appeal shall operate as a stay of execution? I am not at present satisfied that even after an appeal has been lodged the court from which the appeal is brought does not still retain some jurisdiction in relation to its own order. Whether that be so or not, however, it is a not infrequent part of an order of a court that the operation of the order be stayed for a certain period and that if within that period an appeal be lodged the stay is to continue until the determination of the appeal. It seems to me that r. 53 is designed to deal with just such an order whether or not the court from which the appeal is brought has any further jurisdiction over its order after the appeal is lodged.

If my understanding of these Rules is correct, then this court has, under these Rules, no power to entertain an application for the stay of execution of the order of the court below until the appeal is lodged for the very good reason that this court is not possessed of any jurisdiction in relation to that order. This is what I understand has already been decided by the full court in *Motel Schweitzer*

v. Cunningham (1) where the court, though dealing with another aspect of the matter, made the perfectly general comment at p. 254 as follows:

“The notice is a document filed in the proceedings in the Superior Court and in no case is the appeal instituted until the record of appeal is lodged in the Registry of this court, the prescribed fees paid and security lodged as provided in r. 58.”

The ratio of this decision was followed by a single judge, Crabbe, J.A., in *Adam v. I.T. Comr.* (3) where he held specifically that as no appeal had been lodged it was incompetent for this court to entertain an application for a stay of execution. It is true that another single judge, Gould, Ag. V.-P., in *Raniga v. Jivraj*, Civil Application No. 33 of 1962 (not reported) took a different view but, with respect to the views of the then Acting Vice-President, I prefer the reasoning of Crabbe, J.A.

Is there any other provision which gives this court jurisdiction over an order of the High Court before there are appeal proceedings in this court in relation to the order? Reference has been made to O. XLI, r. 4 of the Civil Procedure (Revised) Rules, 1948. This does not in my view confer any additional jurisdiction as the jurisdiction given under this rule is dependent on the existence of an appeal.

The lack of jurisdiction in this court to entertain an application for the stay of execution of an order of the High Court until an appeal is lodged in this court causes me no alarm. Every court has an inherent jurisdiction to stay its own order and the jurisdiction of the High Court to stay its own order does not depend solely on O. XLI. There is absolutely no reason to assume that in a proper case the High Court would not exercise its powers and grant a stay of execution if it is informed that appeal proceedings are contemplated until at least such time as would enable the appeal to be lodged and this court to be possessed of jurisdiction in relation to the order of the High Court.

For these reasons I consider that Law, J.A., had no jurisdiction to stay the execution of the order of the High Court and on this reference I would direct that the order of Law, J.A., be set aside and the application for the stay be refused.

Having regard to my view on the jurisdiction of this court it is strictly unnecessary for me to express any view on the merits of the application. I think, however, that I should say that a stay of execution should not be lightly ordered by this court. In the case under consideration it was never in dispute before the High Court that the respondent was entitled to possession. The trial judge who heard the case refused to stay his order for possession. So did another judge of the High Court. I have heard absolutely nothing which satisfies me that even if this court at this stage had jurisdiction to grant a stay it should do so.

My brethren are of the view that Law, J.A., had jurisdiction to make the order for the stay but they consider, as I do, that on the facts of the case a stay should not have been granted. Accordingly, it is ordered that the order of Law, J.A., be set aside, and that the application for the stay be refused. The applicant will pay the costs of the application before Law, J.A., and of this reference to the full court.

Application refused on its merits.

For the applicant:

B. D. Bhatt, Nairobi

For the respondent:

Shah & Shah, Nairobi

Ramnik R. Shah

Salau Dean v Republic
[1966] 1 EA 272 (HCK)

Division: High Court of Kenya at Nairobi
Date of judgment: 30 March 1966
Case Number: 55/1966
Before: Sir John Ainley CJ and Dalton J
Sourced by: LawAfrica

[1] Natural justice – Criminal trial – No opportunity of being heard on point arising after the hearing.

[2] Criminal law – Trial – Irregularity – Tape recording – Conversation between accused and witness tape recorded – English transcript of tape recording put in evidence – Only parts of tape recording played in court – After trial tape recording played and translated differently in magistrate’s chambers in absence of accused or his counsel – Magistrate accepted new translation – Whether irregularity fatal to conviction.

[3] Criminal law – Corruption – Police trap – Money not accepted by person for whom trap laid – Whether person giving money guilty of corruption.

[4] Criminal law – Evidence – Admissibility – Tape recordings – Translations.

Editor’s Summary

The appellant was convicted of corruption and giving false information to a person employed in the public service. The evidence was that the police were informed by the appellant that a certain immigration officer had asked him for £50 to refrain from prosecuting a friend of his under the Immigration Act and a police trap was laid; that when the appellant met the immigration officer he had a long conversation with him which was tape recorded by various devices; that when the trap was closed the appellant and the immigration officer were facing each other and the latter was in possession of the money given to the former by the police. Their conversation was recorded in Punjabi on two spools of tape which were not played over apart from identification purposes at the hearing. A complete English transcript was put in evidence with the agreement of both sides. The immigration officer consistently asserted that the money had been thrust into his pocket by the appellant after prolonged and unsuccessful efforts to persuade him to accept it as a bribe. After the hearing but before judgment the magistrate had the tape played over in the privacy of his chambers in the presence of two police officers and a court interpreter but in the absence of the appellant or his counsel. In doing so the magistrate’s intention was to satisfy himself, with the aid of the interpreter, beyond all doubt that the English transcript was correct. The magistrate was interested in the two Punjabi words which were translated into English as “keep it” and the interpreter assured the magistrate that though a correct and literal translation of the Punjabi words was “keep it” yet these words could be used appropriately when offering another person something, and therefore bear the meaning “take it”. The magistrate held that the expression “keep it” must be construed as “take it”. On appeal,

Held –

- (i) if the immigration officer's version was true then the appellant corruptly offered him the money hoping that the immigration officer would be arrested and not that he would give assistance; *R. v. Smith*, [1960] 1 All E.R. 256 considered;
- (ii) the opinion of the interpreter on a subsequent playing of a tape recording was adverse to the case of the appellant and was given to the magistrate in the absence of the appellant and his advocate and in accepting it the magistrate committed a fundamental error depriving the appellant not only of the semblance but of the substance of a fair trial.

Per Curiam: unless a tape recording has been played in court it is probably wrong for a magistrate to play it himself in the privacy of his chambers. A magistrate or a judge should not hear in chambers what he has not heard in court.

Appeal allowed. Convictions quashed and sentences set aside.

[**Editorial Note:** *R. v. Smith*, [1960] 2 Q.B. 425 was considered in *Sewd Singh Mandla v. Republic*, E.A.C.A. No. 113 of 1966 (reported later in this volume) where the court followed the East African authorities and held that a corrupt motive was a necessary ingredient of an offence under s. 3 (2) of the Prevention of Corruption Act (Cap. 65).]

Cases referred to in judgment:

- (1) *R. v. Smith*, [1960] 1 All E.R. 256.
- (2) *R. v. Maqsud Ali*; *R. v. Ashiq Hussain*, [1965] 2 All E.R. 464.

Judgment

Sir John Ainley CJ, read the following judgment of the court. In this case the appellant was convicted of corruption contrary to s. 3 (2) of the Prevention of Corruption Act, and of two offences of giving false information to a person employed in the public service contrary to s. 129 (a) of the Penal Code.

The story is somewhat complex. It is clear that one Mrs. Pantall ran some risk of prosecution at the hands of the immigration authorities, and that the appellant was anxious to prevent her prosecution. In his efforts to assist this lady the appellant interviewed, and quarrelled with an immigration officer named de Rungary. Another immigration officer named Kushi Mohamed Chaudhery, who was in charge of investigations into immigration matters and who normally prosecuted in immigration cases, was drawn into this discussion, but did not so far as we can see do much or indeed anything to incur the appellant's enmity.

Be that as it may, on May 11, 1965, that is the day following the interview the appellant informed Mr. Bell, a Senior Superintendent of Police, that Chaudhery had said that for £50 he would refrain from prosecuting Mrs. Pantall. Mr. Bell thought it advisable to lay a police trap, and a trap was laid.

On that day the appellant spoke to Chaudhery over the telephone and by various devices the conversation was recorded upon a tape recorder.

On the following day, that is on May 12, the appellant provided himself with five Shs. 100/- notes. The police fitted him with a miniature microphone and transmitter. Receiving apparatus was installed in a police car, together with a tape recorder. The appellant then met Chaudhery, and had a long conversation with him, which, by means of the devices referred to was, partially at any rate, recorded on the tape. All this resulted in two spools of tape which could be "played" on a machine, so that the sounds and speech recorded could be heard.

It was also arranged that a police party should, so far as was possible, keep an eye upon the appellant and Chaudhery and it was understood that when Chaudhery accepted the money the appellant would make a signal, whereupon Chaudhery would be arrested. Such a signal was not observed or at any rate understood by the police, but there came a time when after a lengthy conversation in a coffee house the

appellant and Chaudhery walked along Gill Street, Nairobi, and entered Gill House. They were for a few moments out of sight of the police watchers, but when the police arrived the two were facing each other, and Chaudhery was in possession of the appellant's notes. Senior Superintendent Bell, who came to the scene, assumed not unnaturally that the trap had caught the expected quarry, and the appellant asserted to the police that he had handed

the notes to Chaudhery as they walked together from the coffee-house to Gill House. Yet Chaudhery asserted then and asserted at the trial that the money had been thrust into his pocket by the appellant when the two of them were alone in the entrance to Gill House, after prolonged and unsuccessful efforts had been made by the appellant to persuade him to accept it as a bribe. If Chaudhery told the truth then undoubtedly the appellant was guilty of the three offences of which he was convicted.

We respectfully agree with the reasoning and the decision in *R. v. Smith* (1), and we have no doubt that if Chaudhery told the truth then the appellant corruptly offered Chaudhery the money in question although he did not intend Chaudhery to aid him in return for the money, but hoped that Chaudhery would be arrested, and charged with taking a bribe before he could take any action.

Now the conversation between the appellant and Chaudhery was in Punjabi, and painstaking efforts were made to obtain an accurate English transcript of the tape recording. It is clear that these efforts were to some extent successful, and the transcript made was accepted by both sides as being accurate so far as it went. The record of the conversation though it is defective in that what Chaudhery said has very frequently been lost, does tend to support Chaudhery's story. Mainly because of this, we think, it was the appellant who was prosecuted, while Chaudhery, the original suspect, became an important witness for the prosecution.

The very great importance of the tape recording can now be understood.

At the trial the two spools were tendered in evidence and on the authority of *R. v. Maqsood Ali; R. v. Ashiq Hussain* (2), they were in our opinion correctly admitted.

It appears that the entire record contained on the spools was not played-over in the lower court, though parts were played for the purposes of identifying the spools and tapes. The appellant was represented by very experienced counsel and clearly both sides thought that to play over the whole record in court would be a waste of time. That was common sense, but we shall refer to this matter again.

However as we have said the English transcript was accepted by both sides, and became an important exhibit, each side seeking to make what capital they could from the admittedly disjointed and imperfect record.

At the end of the hearing, a very patient and proper hearing be it said, the learned magistrate reserved judgment. The hearing ended on October 21, 1965. The magistrate delivered judgment on December 3, 1965, and as we have said convicted upon all three counts. The judgment was clear and well reasoned and we find no significant misdirections therein, but between the conclusion of the hearing and the delivery of the judgment matters occurred of which complaint is very properly made. Shortly before the learned magistrate wrote and delivered his judgment, the date rather strangely is uncertain, the magistrate had the record played over in the privacy of his chambers, there being present Senior Superintendent Bell to whom we have referred, Chief Inspector Phillips, who gave evidence in the case as the electronics expert, and one Hardial Singh Sidhu an executive officer of this court, who is fluent in Punjabi and English.

Neither the appellant, nor any representative of the appellant, was present.

We have read affidavits from the three persons mentioned and we say at once that we are convinced that the learned magistrate acted in perfect good faith. Senior Superintendent Bell was we think present because he had been told by a superior officer to make arrangements for the playing of the record. Chief Inspector Phillips was quite obviously present because he was the expert able to play the record. We do

not suppose that either of these officers discussed the

case with the learned magistrate on this occasion. The part played by Hardial Singh we will consider in a moment, and it was an honest part, but it is scarcely necessary to point out that this gathering in the magistrate's chambers which was obviously in connection with the appellant's case would very seriously disturb any thinking member of the public who learned of it, while the appellant would beyond doubt and quite reasonably form the view that very unfair tactics had been used. The appearance of justice was not given here. This court should not be faced with a situation where it is asked to try the court below, as it were, and indeed in some cases of this kind this court may refuse to do so, saying simply that so grave an appearance of injustice has been given that it would be wrong and unnecessary for the purposes of an appeal to embark on a lengthy inquiry into the exact details of the matter.

In this case however we have been given, without objection from the appellant, a fairly clear picture of what happened by the affidavits filed.

The learned magistrate's main concern was we think to satisfy himself beyond all doubt that the English transcript was correct. He reasoned that there could be nothing wrong in making a check with the aid of Hardial Singh. We must disagree. It can of course be said that if, as indeed happened here, the interpreter confirms the accuracy of an English transcript no harm has been done, but it is clearly wrong, we think, to adopt a procedure which may lead to an amendment in private of a transcript on the basis of which both the prosecution and the defence have argued their case.

We would say also, though here we may appear hypercritical, that if the tape recording has not been played in court it is probably wrong for the magistrate to play it to himself in the privacy of his chambers. We do not think that a magistrate or judge should hear in chambers what he has not heard in court, and in certain cases much may be gathered from the tone of the recorded voices of the speakers.

We do not however decide this case on that ground. This affair went beyond a mere checking of the transcript. A very important part of the conversation between the appellant and Chaudhery took place immediately before the pair arrived at Gill House, and after they had arrived there. It will be remembered that the appellant's story was that the notes were in Chaudhery's possession before the arrival at Gill House, and that Chaudhery's story was that they were thrust on him after arrival at Gill House. The transcript of the conversation almost immediately before the police came on the scene reads:

- Chaudhery: I am far above these things. I have never done such a thing. Never do that and to my knowledge I know nobody . . . By God I don't do such things. Not even – not even, not these things
- These Europeans . . .
- (Then apparently a mingling of voices, and then –)
- Appellant: No, I think . . . before your coming she was telling me not like this – this you don't.
- You keep it.
- Chaudhery: Not at all
- Appellant: No you keep it. You keep it. By God don't be silly, don't be silly.

Now it scarcely needs pointing out that those passages support Chaudhery's version of affairs, and so the learned magistrate held. According to the affidavits before us the magistrate was, very rightly, interested in those passages and again very rightly he was interested in the two Punjabi words which were rendered

in English as “Keep it”. Those words deserved inquiry for the very obvious reason that if the Punjabi words could apply only to something already in the possession of the person addressed, then perhaps the appellant’s story rather than Chaudhery’s story was supported by their use.

Learned state counsel has said with some reason that there is after all not a vast deal in the point, and that there was very much in the transcript and in other recorded evidence which could be thought greatly to outweigh anything that could be made of the matter.

But counsel for the appellant has said in effect that be the matter small or great there was some matter there, and it was matter in which the learned magistrate was interested.

The learned magistrate in the privacy of his chambers received from Hardial Singh the assurance that though a correct and literal translation of the Punjabi words as “keep it” yet these words could be used appropriately when offering another person something, and could therefore bear the meaning “take it”.

Now Hardial Singh may very well have been right about this. His Punjabi is no doubt perfect, and his English good. That is no doubt why the magistrate asked him about the meaning of those words, and as we think relied on what he said.

In the judgment, which is a very good judgment, we find this immediately after the learned magistrate has quoted the passages which we have set out – “In both the parts of the dialogue which have been reproduced above, the expression ‘Keep it’ must be construed as ‘take it’ and I understand that ‘keep’ is a literal translation of the Punjabi expression which is used in both senses, viz., ‘hold on to something one has already got’ and ‘take it’”.

It is perfectly clear that the learned magistrate, albeit in good faith, took the opinion of someone whom he regarded as an expert upon a matter which had some bearing on the case. That opinion was adverse to the case of the appellant. That opinion was accepted by the magistrate and was clearly enough placed by him, when he came to write his judgment, upon the Republic’s side of the scales.

That opinion was given to the magistrate in the absence of the appellant and in the absence of the appellant’s advocate. The appellant had no opportunity to contravert that opinion. He was unaware that such an opinion had been given.

Now both counsel have in effect asked us to regard what took place in the magistrate’s chambers as (to quote the words of s. 382 of the Criminal Procedure Code) – “proceedings . . . during the trial” and have referred to the numerous cases in which High Courts, Supreme Courts, Courts of Appeal and the Judicial Committee of Her Majesty’s Privy Council have sought to interpret this section, once described by a former Chief Justice of Kenya as “overworked”.

We venture to doubt whether s. 382 of the Criminal Procedure Code has anything to do with the present case. If magistrates, judges, assessors, or jurymen, having heard the evidence led during a trial, go off before writing their judgments, giving their opinions, or returning their verdicts, and glean in the absence of the accused information, and opinions, relevant to the case, there arise perhaps no questions of irregularity in the administration of the Criminal Procedure Code, or in the administration of any other law. These magistrates, judges or assessors have decided to arrive at their conclusions by methods unknown to any written law. No court of appeal can allow a conviction had by such methods to stand, or so we think.

However if we are wrong here, and must decide this case upon the basis that we are dealing with a case to which the section is relevant, we are strongly of the opinion that the error was fundamental, and deprived the appellant not only of the semblance, but of the substance of a fair trial.

We are perfectly satisfied that these convictions must be quashed and the sentences set aside, and we

so order. It is within our powers to order a re-trial but we have decided not to exercise those powers.

It is true that there is an impressive body of evidence against the appellant to which no exception can be taken. Yet the appellant was first arrested in June last year. The events said to incriminate him occurred in May last year. Upon both sides witnesses of dubious veracity were called. We do not think that ten months after the events in question, and after, if we may so express it, every witness has had an ample rehearsal, justice can now with certainty be done.

We have not indeed been asked to order a re-trial, and we decide not to do so.

The appeal is allowed. The convictions are quashed. The sentences are set aside. The appellant has surrendered to his bail. His sureties are discharged from their bonds. The appellant goes free.

Appeal allowed. Conviction quashed and sentence set aside.

For the appellant:

Shapley Barret Marsh & Co., Nairobi

Bryan O' Donovan, Q.C. and S. Thanawala

For the respondent:

The Attorney General, Kenya

J. R. Hobbs (Senior State Attorney, Kenya)

Abraham Lucky Gaciatta v Republic [1966] 1 EA 277 (HCK)

Division: High Court of Kenya at Nairobi

Date of judgment: 6 April 1966

Case Number: 46/1966

Before: Sir John Ainley CJ and Dalton J

Sourced by: LawAfrica

[1] Criminal law – Making a false return or statement – Accused a member of the House of Representatives – Whether accused is “a person employed in the public service” within the meaning of the Penal Code (Cap. 63) s. 4 (K.).

Editor's Summary

The appellant was charged and convicted upon seven counts of furnishing a return in support of a claim for travelling allowance which to his knowledge was “false in (any) material particular”, under s. 100 of the Penal Code. This section relates to “any person . . . being employed in the public service . . .”. The appellant, as a duly elected member of the House of Representatives, was entitled to a travelling allowance paid from public funds. It was alleged that the appellant's motor car was undergoing repairs

during the period when the claim was made and that the assertion that he had made the journey in his own motor car was to his knowledge false. The trial magistrate held that the appellant had knowingly made a false return or statement and that the appellant was a “person employed in the public service” within the meaning of s. 4 of the Penal Code. On appeal, the substantial issue at the hearing was whether or not the appellant was a person employed in the public service. It was argued on behalf of the appellant that if a man can be said to be employed in a service public or otherwise he must be employed by someone and a relationship of master and servant or employee and employer must exist, and in further support of this contention it was argued that s. 41(1)(f) of the Constitution declared that no person shall be qualified to be elected as a member of either House of the National Assembly who at the date of his nomination for election was a public officer. On the other hand, counsel for the State relied on s. 4(b) of the Penal Code which provides that any person who holds “any office to which a person is appointed or nominated by Act or by election” is a person employed in the public service, and it was further pointed out that s. 244 of the Constitution referred to membership of the House of Representatives as an office.

Held –

- (i) the trial magistrate was correct in holding that the appellant had knowingly made a return or statement false in a material particular:

- (ii) while all public officers fall within the definition of “persons employed in the public service” which is contained in s. 4 of the Penal Code, there are people who also fall within that definition and yet are not public officers in the sense in which that phrase is used in the Constitution;
- (iii) in Kenya membership of parliament is properly regarded as an office and therefore the appellant was correctly convicted as “a person employed in the public service”.

Appeal dismissed.

Cases referred to in judgment:

- (1) *Bay of Islands Case*, 34 N.Z.L.R. 578.

Judgment

Sir John Ainley CJ read the following judgment of the court.

In this case the appellant who was at all relevant times a duly elected member of the House of Representatives, was convicted upon seven counts each charging an offence contrary to s. 100 of the Penal Code. He was sentenced in all to three years’ imprisonment, and he appeals from conviction and sentence.

Section 100 of our Penal Code reads:

“Any person who, being employed in the public service in such a capacity as to require him or to enable him to furnish returns or statements touching any sum payable or claimed to be payable to himself or to any other person, or touching any other matter required to be certified for the purpose of any payment of money or delivery of goods to be made to any person, makes a return or statement touching any such matter which is, to his knowledge, false in any material particular is guilty of a misdemeanour.”

By virtue of being a member of the House of Representatives the appellant was entitled to a travelling allowance, paid from public funds, in respect of journeys made between his constituency and Nairobi, and if he was “employed in the public service” he was employed in the capacity mentioned in the section.

The appellant owned a motor car. On seven occasions during a period when his motor car was laid up in a garage undergoing extensive repairs he furnished a statement to support a claim for the travelling allowance mentioned in which he asserted what was to his knowledge false, that is that he had made the journey in his motor car.

The learned magistrate correctly held that this was knowingly to make a return or statement false in a material particular.

He held also that the appellant, because he was an elected member of the House of Representatives, was a person employed in the public service. Here, learned counsel for the appellant has urged, the learned magistrate erred. He argues that if a man can be said to be employed in a service public or otherwise he must be employed by someone and a relationship of master and servant or employer and employee must exist.

Were it not for the astonishingly wide and complex definition of “person employed in the public service” contained in s. 4 of the Penal Code we would without hesitation have agreed with what the appellant’s counsel has said. We should not have supposed that the matter bore serious argument. The

words “The public service” in England normally bear the meaning “the public service of the Crown”. In modern Kenya we would suppose that they meant “the

public service of the Government of Kenya”, and the Constitution of Kenya uses these words “the public service” in that sense on occasion.

But the definition contained in s. 4 of the Penal Code of “person employed in the public service” which is relied upon by the Republic reads:

“‘Person employed in the public service’ means any person holding any of the following offices or performing the duty thereof, whether as a deputy or otherwise, namely –

- (a) any civil office, including the office of Governor General, the power of appointing a person to which or of removing from which is vested in Her Majesty or in the Governor General or in the Judicial Service Commission or in any public commission or board; or
- (b) any office to which a person is appointed or nominated by Act or by election; or
- (c) any civil office the power of appointing to which or removing from which is vested in any person or persons holding an office of any kind included in para. (a) or para. (b) of this definition; or
- (d) any office of arbitrator or umpire in any proceeding or matter submitted to arbitration by order or with the sanction of any court, or in pursuance of any Act;

and the said term further includes:

- (i) a justice of the peace;
- (ii) a member of a commission of inquiry appointed under or in pursuance of any Act;
- (iii) any person employed to execute any process of a court, including an African Court;
- (iv) all persons belonging to the military forces of Kenya.
- (v) all persons in the employment of any government department;
- (vi) a person acting as a minister of religion of whatsoever denomination, in so far as he performs functions in respect of the notification of intending marriage or in respect of the solemnization of marriage or in respect of the making or keeping of any register or certificate of marriage, birth, baptism, death or burial, but not in any other respect;
- (vii) a person in the employment of a local authority.”

Paragraph (a) of that definition should perhaps be read and construed in accordance with the provisions of s. 7(1)(a) and (b) of the Constitution of Kenya (Amendment) Act, 1965 (14 of 65) but that is not beyond question and it is probably wise to read para. (a) nowadays as “any civil office . . . the power of appointing a person to which is vested in any public commission or board”.

The matter however is of no great moment in the present case and the whole definition has been set out to indicate how wide a meaning is given to the words defined. It is not possible, it seems, exactly to equate the expression “employed in the public service” with “employed in the public service of Kenya”, still less perhaps to equate the expression with “public officer” which is defined in the Interpretation and General Provisions Act, and which nowadays probably means a person in the service of or holding office under the Government of Kenya, whether such service or office is permanent or temporary, or paid or unpaid. However the paragraph of the definition of s. 4 of the Penal Code upon which reliance is placed is para. (b). It is said that a member of the House of Representatives holds an office to which he is appointed or nominated by election. The objection that membership of the House of Representatives is

not an “office” is answered by saying, correctly, that the Constitution in s. 244 clearly refers to membership of the House of Representatives as an office, and by implication indicates that it is an office established by the Constitution. The relevant part of that section reads:

“244 (1) Any person who is appointed, elected or otherwise selected to any office established by this Constitution, including the office of President or Vice-President, or any office of Minister established under this Constitution may resign from that office by writing under his hand addressed to the person or authority by whom he was appointed, elected or otherwise selected: Provided that . . .

(c) the resignation of any person from the office of member of either House of the National Assembly or a Regional Assembly shall be addressed to the Speaker of that House or the Chairman of that Regional Assembly; . . .”

We would add that in the *Bay of Islands Case* (1), the court considered the word “office” in the context of the Legislative Act of 1908, apt to designate a seat in the Legislative Council of New Zealand.

We have already indicated, perhaps, the answer which the Republic gives to the objection that s. 41(1)(f) of the Constitution declares that no person shall be qualified to be elected as a member of either House of the National Assembly who at the date of his nomination for election is a public officer. “Public Officer” is defined by s. 247 of the Constitution to be a person holding or acting in any public office, and “public office” means any office in the public service, and “the public service” includes the public service of the Government of Kenya or of any Region at any time before December 12, 1963.

It certainly appears that the framers of the Constitution consider “the public service” to be what most of us would suppose it to be, a service in the sense that the English Civil Service or let us say, the secret service and the preventive service are services. Public officers, public servants and so on are by the Constitution as by the Interpretation and General Provisions Act regarded as persons serving in an organized public service. But while all public officers no doubt fall within the definition of “persons employed in the public service” which is contained in s. 4 of the Penal Code there are clearly classes of persons who also fall within that definition and yet are not public officers in the sense in which that phrase is used in the Constitution. As it seems to us the attempt very fairly made by learned counsel for the appellant to reduce the Republic’s arguments to an absurdity has failed.

Once the extraordinary breadth of the definition in s. 4 of the Penal Code is understood, and it is conceded, as we think it must be conceded, that in Kenya membership of parliament is probably regarded as an office, then we think that the argument for the Republic must prevail, and it follows that the appellant was correctly convicted.

We now turn to the question of sentence. Some Shs. 4,000/- of public money were involved, and though the appellant was not convicted of an offence a necessary element of which was fraud he might well have been so convicted.

We consider that what was disclosed in this case justified a sentence of imprisonment, but we consider that an aggregate sentence of three years’ imprisonment was far too severe for a first offender. This aggregate has been achieved by imposing a short sentence in respect of each of a series of offences and then ordering the sentences to run consecutively. We reduce the aggregate sentence

by imposing a sentence of nine months' imprisonment upon each count and ordering that these sentences be served concurrently.

We dismiss the appeals from conviction.

Appeal dismissed.

For the Appellant:

A. R. Kapila & Co., Nairobi

S. A. Rao

For the Respondent:

Attorney General, Kenya

K. C. Brookes (Deputy Public Prosecutor, Kenya)

GP Jani Properties Limited (in Voluntary Liquidation) v Dar-es-Salaam City Council
[1966] 1 EA 281 (CAD)

Division:	Court of Appeal at Dar-es-Salaam
Date of judgment:	30 May 1966
Case Number:	16/1966
Before:	Duffus Ag VP, Spry and Law JJA
Sourced by:	LawAfrica
Appeal from:	High Court of Tanzania – Georges, C.J.

[1] Practice – Pleading – Complaint – Cause of action – Claim mis-stated but particularised sufficiently to show basis of amount said to be owing – Whether complaint disclosed cause of action.

[2] Practice – Pleading – Further and better particulars filed – Defence that complaint did not disclose a cause of action – Whether such particulars can be looked at.

[3] Practice – Appeal – Application for amendment of pleading – Omission to plead that a certain planning scheme was ultra vires – Issue mentioned in argument below but no application for amendment made – Whether appellate court should allow amendment.

Editor's Summary

The respondent had filed two suits, one in the High Court and the other in the District Court, claiming Shs. 31,850/- and Shs. 17,930/- respectively, and both these suits were consolidated. Both the complaints

were identically worded and the sum in question was claimed as “being due and owing . . . as per the Invoice annexed hereto and marked ‘A’ being the amount of the final apportionment made in accordance with the fourth schedule of the Kisumu Detailed Planning Scheme 1961 . . . of the expenses incurred by the Council . . .”. A request for further and better particulars of the expenses was complied with making it clear that the sum claimed was not an apportionment of the expenses incurred by the Council as pleaded in the plaint but the apportionment of the appellant’s indebtedness arising out of the implementation by the Council of the Kisumu Detailed Planning Scheme. A preliminary issue had been taken that each suit did not disclose a cause of action and the learned Chief Justice in deciding in favour of the respondent held that the plaint itself did not disclose a cause of action, that a cause of action was disclosed if the plaint was read together with the further and better particulars supplied, and that such particulars could be looked at in determining whether the plaint disclosed a cause of action. The appellant appealed on the grounds that the plaints did not disclose a cause of action and should have been rejected under the mandatory provisions of O. 7, r. 11 of the Civil Procedure Code, and also that the court was not entitled to look at further and better particulars when deciding whether a plaint disclosed a cause of action. The respondent cross-appealed on the ground that the plaints did disclose a cause of action apart from the particulars supplied.

Another ground of appeal was that the court below had refused to deal with the issue whether the planning scheme was ultra vires the powers conferred upon the Minister because it had not been pleaded and was raised only in the closing address.

Held –

- (i) the claim as pleaded was mis-stated but this was neither a defect going to the root of the matter nor a non-disclosure of a cause of action;
- (ii) the complaints, apart from the particulars supplied, sufficiently disclosed a cause of action which was for the amount owed by the appellant on the respondent implementing the planning scheme;
- (iii) the learned Chief Justice was right in refusing to hear the “ultra vires” allegation because it was raised at the last possible moment without being pleaded, and without any application for amendment of the defence;
- (iv) the application to amend the written statement of defence on appeal would be refused as it sought to raise a fundamental issue at a very late stage; there was no question of inadvertence as the matter was mentioned in argument at the trial: *Jupiter General Insurance Co., Ltd. v. Rajabali Hasham and Sons*, [1960] E.A. 592, distinguished.
- (v) it was not open to the appellant to challenge the validity of the planning scheme on the pleadings as they stood.

Appeal dismissed.

Cases referred to in judgment:

- (1) *Bruce v. Odhams Press, Ltd.*, [1936] 1 All E.R. 287.
- (2) *Jupiter General Insurance Co., Ltd. v. Rajabali Hasham & Sons*, [1960] E.A. 592 (C.A.).

The following judgments were read.

Judgment

Law JA: This is an appeal against a judgment and decree of the High Court of Tanzania (Georges, C.J.) awarding the City Council of Dar-es-Salaam (hereinafter referred to as the respondent) the sum of Shs. 41,846/- being moneys allegedly due to the respondent by the appellants in respect of their liability consequent upon the implementation of a planning scheme made under the Town and Country Planning Ordinance (Cap. 378). Two suits, one in the High Court and one in the District Court, claiming respectively Shs. 31,850/- and Shs. 17,930/- were consolidated and heard together, the complaints in both suits being identically worded. The main grounds of appeal are that the complaints filed by the respondent did not disclose a cause of action and should therefore have been rejected in accordance with the mandatory provisions of O. 7, r. 11 of the Civil Procedure Code, and that the learned Chief Justice erred in holding that he was entitled to look at further and better particulars of the complaints, filed by the respondent subsequently to, and separately from, the original complaints, in deciding whether a cause of action was disclosed. The question whether the complaint in each suit disclosed a cause of action was tried as a preliminary issue, which the learned Chief Justice decided in favour of the respondent. He held as follows:

- (a) that the plaint by itself did not disclose a cause of action;
- (b) that a cause of action was disclosed if the plaint was read together with the further and better particulars supplied by the respondent at the appellants' request; and
- (c) that the further and better particulars could be looked at in determining whether the plaint disclosed a cause of action.

The respondent has cross-appealed on this point, supporting the Chief Justice's decision not to reject the plaintiff but contending that the plaintiff, without reference to the further and better particulars, did disclose a cause of action.

It is therefore necessary to examine carefully the original plaintiff in the High Court suit, which as I have already remarked was identical with that in the District Court suit. The relevant paragraph, No. 3, reads as follows:

"The plaintiff council claims jointly and severally against the defendants as being the liquidators of G. P. Jani (Properties) Ltd., a sum of Shs. 31,850/- due and owing by them as per the Invoice annexed hereto and marked 'A' being the amount of the final apportionment made in accordance with the fourth schedule of the Kisumu Detailed Planning Scheme 1961, in respect of Plot No. 6 Block 186053, Title No. 10280 junction of Selous and Kisumu Streets, Dar-es-Salaam owned by the said company now in liquidation of the expenses incurred by the council in apportioning the land and preparing the scheme in accordance with the said Kisumu Detailed Planning Scheme."

The invoice annexed to and forming part of the plaintiff reads, so far as it is material:

"To charges being ten percent. of the site value of Shs. 318,500/- on plot No. 6 Blk. 186053, junction of Selous and Kisumu Streets in accordance with Schedule 4 of the Kisumu Detailed Planning Scheme, 1961 Shs. 31,850,00."

The further and better particulars were filed pursuant to a request by the appellants for particulars "of the expenses alleged to have been incurred by the council", and these particulars made it quite clear that the sum claimed was not an apportionment "of the expenses incurred by the council", as pleaded in the plaintiff, but the apportionment of the appellants' indebtedness arising out of the implementation by the council of the Kisumu Detailed Planning Scheme. The claim as pleaded was accordingly mis-stated, but in my opinion this was not a defect going to the root of the matter and resulting in a non-disclosure of a cause of action. If the words "of the expenses incurred by the council" are disregarded, it is still clear from the plaintiff that the respondent's claim was "for the sum of Shs. 31,850/- owing to them (the council) as per the invoice annexed and marked 'A' being the amount of the final apportionment made in accordance with the said Fourth Schedule of the Kisumu Detailed Planning Scheme, 1961".

In my view the plaintiff, although misleading in describing the sum claimed as being an apportionment of the expenses incurred by the council, sufficiently disclosed the cause of action which was that the claim represented the amount owed by the appellants being the final apportionment made in accordance with the planning scheme of their indebtedness to the council for implementing the scheme.

It follows that in my opinion the grounds of appeal directed against the Chief Justice's refusal to reject the plaintiff as disclosing no cause of action fail, and the cross-appeal succeeds on the point that a cause of action was disclosed without the necessity for reference to the further and better particulars. It is therefore not necessary to decide whether it was proper for the Chief Justice to have regard to the further and better particulars in coming to his decision, but the question is of sufficient interest to deserve some comment. Counsel for the appellants referred in this connection to *Bruce v. Odhams Press, Ltd.* (1) and in particular to that part of the judgment of Scott, L.J., which reads ([1936] 1 All E.R. at p. 294):

“The function of ‘particulars’ . . . is quite different. They are not to be used in order to fill material gaps in a demurrable statement of claim – gaps which ought to have been filled by appropriate statements of the various material facts which together constitute the plaintiff’s cause of action . . . Consequently in strictness particulars cannot cure a bad statement of claim.”

The use of the words “in strictness” should be noted, because the learned Lord Justice goes on to point out that a defendant has two courses of action open to him in answer to a defective plaint; the “more stringent remedy” of applying for it to be struck out as disclosing no cause of action, or “the more lenient remedy” of asking for particulars because the plaint is defective. It seems to me, therefore, that a defendant who, as in this case, asks for further and better particulars of a plaint is running the risk of weakening his position if he subsequently applies for the plaint to be rejected as disclosing no cause of action because, it could be argued, the fact of having asked for particulars of a claim implies recognition of the existence of a cause of action. Although I do not think, with respect, that the Chief Justice was entitled to look at the further and better particulars on an application to reject a plaint as disclosing no cause of action, I do not need to express a definite opinion on this point, as I am satisfied that the plaint in this case, read together with the annexed invoice sufficiently disclosed a cause of action.

The other grounds of appeal relied on by counsel for the appellants were those alleging that the Kisutu Detailed Planning Scheme prepared by the Minister for Local Government was ultra vires the powers conferred upon the Minister by the Town and Country Planning Ordinance, particularly cl. 15 and para. (b) of the Fourth Schedule to the Scheme. The question whether the Scheme was ultra vires the powers conferred by the Town and Country Planning Ordinance was not pleaded, and was first raised in the closing address by counsel who appeared for the appellants at the hearing. The Chief Justice refused to deal with the issues not raised in the pleadings involving an argument that the Scheme was ultra vires. He said in the course of his judgment “if it had been intended that that should have been argued, then it should have been specifically set out in the defence”. Support for this view is to be found in O. 8, r. 2, of the Civil Procedure Code, which reads:

“The defendant must raise by his pleading all matters which show the suit not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence as, if not raised, would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the plaint, as, for instance, fraud, limitation, release, payment, performance, or facts showing illegality.”

As is said in the commentary to O. 8, r. 2, in Chitale and Rao on the Code of Civil Procedure (5th Edn.):

“It is the duty of a defendant to particularize in his defence all points, either of fact or of law, which he desires to take.”

I consider that the Chief Justice was right in refusing to entertain a defence based on “ultra vires”, raised at the last possible moment, and which was not even made the subject of an application at the hearing of the suit for leave to amend the written statement of defence. It was in these circumstances that counsel for the appellants applied, at the opening of the hearing of this appeal, for leave to amend the written statement of defence by the addition of a new para. 10 as follows:

“The defendant denies liability to pay Shs. 49,780/- or any part thereof to the plaintiff on the ground that cl. 15 (1) and cl. (b) of Schedule IV of the Kisumu Area Detailed Planning Scheme, 1961, on which the plaintiff’s claim is based are beyond the powers created by cl. 3 and/or cl. 9 of the Third Schedule to the Town and Country Planning Ordinance (Cap. 378) and/or that conditions under the said cl. 3 and/or cl. 9 of the Third Schedule to the said Ordinance are not satisfied.”

There can be no doubt that this court has power to allow such an amendment, even at this late stage. A similar position arose in *Jupiter General Insurance Co. Ltd. v. Rajabali Hasham and Sons* (2), when an application was made for leave to amend a written statement of defence at the hearing of the appeal. The reasons which prompted the court to grant the indulgence sought were, inter alia,

- (a) that the subject matter of the amendment became known to counsel only after judgment had been pronounced in the High Court, and
- (b) that all the material to enable the new ground of defence to be considered was before the Court of Appeal so that there was no need to remit the matter for further evidence, or for re-trial, to the High Court.

The instant case is clearly distinguishable. The subject matter of the proposed amendment was in the mind of counsel when the suit was tried in the High Court, and the application for amendment should have been made to the High Court. We reserved our decision on counsel for the appellants’ application, which in my opinion should be dismissed. The issue now sought to be raised is fundamental, and should have been raised long ago. No question of inadvertence is involved, as the matter was mentioned in argument at the trial. Further pleadings would almost certainly be required, and possibly further evidence. Nor do I consider that it is open to the appellants to challenge the validity of the Scheme on the pleadings as they stand, as in accordance with the maxim “omnia praesumuntur rite et solemniter esse acta” it must be assumed that the Scheme was intra vires unless the contrary is asserted and shown to be the case.

There remains the first part of the cross-appeal to be dealt with, which challenges the Chief Justice’s finding that the appellants were liable to pay 7 per cent. of the value of their land instead of the 10 per cent. claimed by the respondent. An owner of land within the area of a planning scheme is liable to lose up to 28 per cent. of his land, if required for public purposes, without compensation. In fact only 18 per cent. of the appellants’ land was taken, and that is why the appellants were required to pay 10 per cent. of the value of their land, being the proportion which could have been taken, but was not. It was however admitted that in fact only 25 per cent. of the land, the subject of the scheme, was taken overall. The Chief Justice was of opinion that in these circumstances the appellants’ liability was limited to 7 per cent. of the value of their land, and not 10 per cent. as claimed. I see no reason to differ. The figure of 28 per cent. is the maximum which could be reserved without compensation. In fact only 25 per cent. was reserved, and I can see no reason why the appellants should be required to pay more than the figure represented by the benefit actually enjoyed by them; It is not in every scheme that the maximum reservation of 28 per cent. is made; in this case it was 25 per cent. overall and the appellants, having lost 18 per cent. of their land, should not be called upon to pay for more than 7 per cent. which they were allowed to retain. As the Chief Justice remarked, the issue is one of fact and of arithmetic. In my opinion this part of the cross-appeal fails.

Whilst on the subject of arithmetic, it is apparent that an error has crept into the judgment of the court below. The Chief Justice said “the value of the parcels on the date of the coming into effect of the scheme was Shs. 597,800/-”.

In fact the value of the plots was Shs. 318,500/- and Shs. 179,300/- respectively, making a total of Shs. 497/800/-, and 7 per cent. of this figure is Shs. 34,846/- and not Shs. 41,846/- as stated in the judgment and decree, which will have to be amended accordingly.

I would dismiss this appeal with costs, and certify for two counsel. I would not make an order for costs or the cross-appeal, which has partly succeeded and partly failed.

Duffus Ag VP: I also agree with the judgment of Law, J.A., and there will be an order in accordance with his judgment.

Spry JA: I agree.

Appeal dismissed.

For the appellants:

M. J. Raithatha, Dar-es-Salaam

D. O'Donovan, Q.C., M. J. Raithatha and S. J. Jadeja

For the respondent:

The City Solicitor, City Council of Dar-es-Salaam

P. R. Dastur and S. Hirji

Gilbert Ouko v Republic [1966] 1 EA 286 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	9 March 1966
Case Number:	564/1965
Before:	Sir John Ainley CJ and Madan J
Sourced by:	LawAfrica

[1] *Criminal law – Corruption – Charge against police officer of receiving bribe for releasing convicted prisoner – Accused not in a position to assist in release of prisoner – Definition of “public body” – Prevention of Corruption Act (Cap. 65) s. 3(1) (K.).*

[2] *Criminal law – Trial – Misdirection – Charge of corruption – Defence that case fabricated against accused – Burden of proof – Magistrate directing himself that onus of proof on defence to show fabrication – Whether misdirection fatal to conviction.*

Editor’s Summary

The appellant, a police officer, was charged under s. 3(1) of the Prevention of Corruption Act and

convicted of corruptly receiving Shs. 600/- for undertaking to release a convicted prisoner serving sentence “from Kenya Government prison, a public body a matter in which the said public body is concerned”. The defence was that the case had been fabricated against the appellant and in his judgment the magistrate stated that, “all that was necessary for the defence to succeed was to show that on the balance of probabilities it was a fabrication”. On appeal it was argued that on the facts alleged in the charge the “matter or transaction” in respect of which the bribe was offered was not a matter or transaction which “concerned” a public body, that is to say the Kenya Police, of which the appellant was a member and that the magistrate had misdirected himself concerning the onus of proof. For the respondent it was submitted that the appellant could be regarded as an officer or servant of the Government of Kenya, and that the Government of Kenya was “concerned” with the safe custody of convicts and the doing of justice and the maintenance of the law.

Held –

- (i) the interpretation of “public body” in s. 2 of the Prevention of Corruption Act is very wide and any servant or officer of the Government of

Kenya can be liable if he corruptly undertakes to act in respect of a matter in which the Government of Kenya is concerned, whether the matter is or is not the concern of the officer or servant;

- (ii) the magistrate misdirected himself in saying that the onus of proof was on the appellant of showing that the case against him was fabricated and the safe course to take was to quash the conviction and sentence.

Appeal allowed. Conviction quashed and sentence set aside.

Judgment

Sir John Ainley CJ: read the following judgment of the court.

The appellant was convicted of an offence contrary to s. 3(1) of the Prevention of Corruption Act. In view of certain arguments advanced in this Court, it will be as well at this stage, to set out the subsection. It reads:

“3.(1). Any person who shall by himself, or by or in conjunction with any other person, corruptly solicit or receive, or agree to receive, for himself or for any other person, any gift, loan, fee, reward, consideration or advantage whatever, as an inducement to, or reward for, or otherwise on account of, any member, officer or servant of a public body doing, or forbearing to do, or having done or forborne to do, anything in respect of any matter or transaction whatsoever, actual or proposed or likely to take place, in which the said public body is concerned shall be guilty of a felony.”

This sub-section, with minor variations, is copied from s. 1 (1) of the English Public Bodies Corrupt Practices Act 1869. In the latter Act, however, “public body” is defined, in effect, as a local government body. Here in Kenya “public body” includes the Government of Kenya, the Organisation, any department, service or undertaking of the Government of Kenya and very many local bodies and undertakings.

Now the sub-section in question in this case does make somewhat confusing reading and with the greatest respect to the learned State Counsel who drafted them some confusion can be detected in the particulars to the charge under s. 3(1) of our Act.

The particulars, which set out clearly enough what the appellant was said to have done read:

“During February 1965 at Marigat Police post in the Baringo District of the Rift Valley Province, Guilbert Ouko corruptly received Shs. 600/- for himself from Kamuren Kesolo as a reward for undertaking to release Kaana Kesolo from Kenya Government prison, a public body a matter in which the said public body is concerned.”

The particulars do not state what was in fact the case, that the appellant was a police officer, and therefore a member, officer or servant of a public body, whether that public body is considered to be the Government of Kenya or the Kenya Police. The public body “concerned” is said to be the Kenya Government Prison, perhaps, but really the last two lines of the particulars are almost meaningless. However we are not pressed to say that the charge was defective or bad, and it is in any event quite obvious to us that the appellant knew perfectly well what he was alleged to have done. What is urged upon us is this that the facts alleged were that the appellant, a policeman, corruptly received a gift as an inducement to release from prison a man who had been convicted and sentenced by a court, and that accordingly the “matter or transaction” in respect of which the bribe was offered was not a matter or

transaction which “concerned”

the public body, that is to say the Kenya Police, of which the recipient of the bribe was a member.

The learned Deputy Public Prosecutor has sought to counter this argument by pointing out that the appellant could be regarded as an officer or servant of the Government of Kenya, and that the Government of Kenya is “concerned” with the safe custody of convicts and the doing of justice and the maintenance of the law.

One difficulty here, perhaps, is to determine what the “matter or transaction” can be said to be. The person alleged to have offered the money, an elderly Tugen tribesman, appears to have had somewhat vague ideas as to what he was paying his money for. At one part of the record this man, Kamuren by name, appears to be saying that he was given the impression that there was a fine to pay. If, of course, that was what the appellant told him, then the case is not one of corruption at all, it is clearly and obviously one of obtaining by false pretences, and there appears to be no “matter or transaction” with which any public body is “concerned”. But then on one view of the facts found by the learned magistrate the appellant was really saying “Here is your son in prison. You need not trouble about my methods, but in one way or another I will exercise my great powers and cause him to be released, if you pay me so much.”

There seems to be no suggestion anywhere in the case that the appellant was offering to engineer a prison breaking. What he may have been saying was that even at the late stage affairs had reached he could and would, to use a colloquial phrase, “get the man off”. Clearly there was nothing that the appellant could do as a policeman, but we are reminded that this is not a correct test. We would add, however, that there was nothing that any policeman qua policeman could do. The man could have been released only by the exercise of the President’s powers of pardon or by the High Court upon appeal or in exercise of revisionary powers.

Regarding the Kenya Police as a public body they had, very clearly, no functions in this matter, and therefore, as we think, no “concern” with the matter. To those of us who have spent years interpreting sections similar to what used to be s. 93 of the Penal Code it does appear that some absurd results could follow if the interpretation suggested by the learned Deputy Public Prosecutor was adopted.

Yet we confess that we can see no escape from that interpretation. The English section upon which s. 3(1) of the Prevention of Corruption Act is based was of course designed to be read with a narrow interpretation of “public body”. However in Kenya the English wording is geared to the immensely wide definition of “public body” in s. 2 of our Act, and it does appear to us that any servant or officer of the Government of Kenya can be fixed with liability if he corruptly undertakes to act in respect of a matter in which the Government of Kenya is concerned, whether the matter is or is not the concern of the officer or servant. This ground of appeal fails therefore.

There is, however, a ground of appeal, not strenuously argued by learned counsel for the appellant, which appears to us, we speak with all respect to counsel for the appellant, to be of the utmost importance. It is said, and said correctly, that the learned Senior Resident Magistrate misdirected himself concerning the onus of proof. We are seriously troubled by this matter, for we are dealing with the judgment of a magistrate of long experience. The magistrate set out the issues of fact clearly and correctly, as indeed is his wont. He then stated fully and correctly the rule touching the burden of proof and the benefit of the doubt. He then immediately went on to say:

“The accused’s defence here is that this case has been fabricated against him by the first prosecution witness with the assistance of others and that there is not a word of truth in it. All that is necessary for the defence to succeed is to show that on the balance of probabilities it is a fabrication.”

In this disastrous mis-direction the learned magistrate flatly contradicts all that he had so well said a moment before. We do not pretend to explain what occurred. It may be that the magistrate was momentarily misled by a recollection of what this Court has said when dealing with those special cases in which the legislature of Kenya has with deliberation and in set terms thrown the burden of proof upon the accused. We do not know. We can only say that the instant case is not one of those special cases and that the appellant in this case had not to establish anything, and very certainly he had not to establish the falsity of the prosecution case as a matter of probability before he was entitled to acquittal.

The learned Deputy Director of Prosecutions squarely faced the gravity of the misdirection and argued that no magistrate properly directed could have failed to convict the appellant upon the evidence on record. It is perfectly true that the evidence against the appellant was very strong and we have given due weight to the telling point made by the learned Deputy touching the “receipt” given by the appellant. Yet the appellant gave his evidence on oath and he swore that he had accepted no money from Kamuren and he did present a comprehensible and coherent defence. We think it impossible to say that a magistrate who clearly understood where the onus of proof lay in this case would certainly have convicted the appellant. The appellant we repeat had a defence and swore to it. It is our view that the only safe course to take in this case, in view of the massive misdirection, is to quash the conviction and set aside the sentence. We do so.

The appellant shall be immediately released.

Appeal allowed. Conviction quashed and sentence set aside.

For the Appellant:

Gautama & Guatama, Advocates,

K. C. Gautama

For the Respondent:

The Attorney General, Kenya

K. C. Brookes (Deputy Public Prosecutor, Kenya)

Homi Dara Adrinwalla v Jeanne Hogan and another [1966] 1 EA 290 (HCT)

Division:	High Court of Tanzania at Dar-es-Salaam
Date of judgment:	16 November 1965
Case Number:	7/1965
Before:	Mustafa J
Sourced by:	LawAfrica

[1] Practice – Costs – Taxation – Cost of interlocutory application – Action not finally disposed of – Whether costs of application can be taxed without specific order.

Editor's Summary

The applicant's application for leave as plaintiff to file a reply was dismissed with costs and while the action was still pending the respondents filed a bill of costs which was taxed. The applicant by way of reference appealed against the taxation of the taxing officer on the ground that in the absence of a specific order for payment of costs forthwith the respondents were not entitled to tax their costs of the interlocutory application.

Held – unless the court directs the immediate taxation and payment of costs in an interlocutory application there should be only one taxation of costs in an action, and costs of an interlocutory application should be held over until the final disposal of the suit.

Application allowed.

Cases referred to in judgment:

- (1) *O. K. Oza v. New India Assurance Co., Ltd.*, [1936] 17 K.L.R. 73.
- (2) *Abdi Nuri v. B.E.A. Corporation and Another* (1909), 3 E.A.C.A. 12.
- (3) *Phillips v. Phillips and Others* (1879), 5 Q.B.D. 60.

Judgment

Mustafa J: This is an application by way of reference against a ruling in taxation by the taxing officer in terms of r. 5 of the Advocates (Remuneration and Taxation of Costs) Rules. Counsel for the applicant states that the case in which this application is made is still pending. He states that the pleadings in this case were completed but before it was heard the respondents herein applied for and obtained leave to file an additional written statement of defence. Later counsel for the applicant filed a chamber application for leave to file a reply, and his application for such leave was dismissed with costs. The respondents thereupon filed a bill of costs in respect of the dismissed chamber application, and the bill was taxed, which has resulted in the present application for reference.

Counsel for the applicant's first and most important point is that until the case is completed no costs of interlocutory matters can be taxed unless the Court in dismissing such interlocutory matters with costs specifically so orders, and he states this was not done in this instance.

There is a dearth of authorities about whether taxation of costs is allowed for interlocutory matters pending the termination of the action. I was referred to *O. K. Oza v. New India Assurance Co., Ltd.* (1). In that case, in an action brought for an account alleged to be due to the plaintiff under a contract of agency, the defendants applied by motion for an order directing the plaintiff to furnish particulars, and on that application an order was made for certain particulars to be furnished, and the defendants were awarded the costs of the application. Immediately thereafter the defendants applied to the Registrar to

tax the costs. The Registrar, following Kenya practice, refused to tax the costs until the final disposal of the action, and the defendants appealed. Sheridan, C.J. held that the ruling of the Registrar refusing to tax the costs of the interlocutory application prior to the determination of the suit was correct.

In another case, *Abdi Nuri v. B.E.A. Corporation and Another* (2), while the case was pending the plaintiff made an interlocutory application which was successful, his costs being allowed. An application was thereupon made to the Registrar for the costs to be taxed and a decree for the amount to be drawn up with a view to execution. The Registrar refused and the application was referred by consent to the judge in chambers who upheld the order of the Registrar. That decision turned on the meaning of “decree”.

In *Phillips v. Phillips and Others*, (3), the headnote reads as follows:

“An application by a defendant in an action in the Queen’s Bench Division, to strike out the statement of claim as embarrassing, having been refused by a Divisional Court, the defendant appealed, and the Court of Appeal made an order ‘that the judgment of the court below be reversed with costs of this appeal and of the proceedings in the court below’. The defendant applied to the master to tax the costs, which he declined to do on the ground that they were costs of an interlocutory application, and that the taxation must stand over till the termination of the action:

Held, by the Court of Appeal, that the practice of the Common Law Divisions to have only one taxation of costs in an action does not apply where costs are given by the Court of Appeal, and that under an order of the Court of Appeal directing payment of costs, without any intimation that the taxation and payment are to be postponed, the party to whom they are ordered to be paid is entitled to have them taxed and paid forthwith.”

In that case both counsel agreed it was common ground that in the Common Law Divisions the practice has prevailed of having no taxation of costs till the termination of the action, and that it was the common law practice. It was there held that that practice cannot be applied to an order of the Court of Appeal, and that the order of the Court of Appeal ought to be obeyed, and that an order directing costs to be paid means that they shall be taxed and paid forthwith.

I cannot find, nor has there been referred to me, any authority for taxation of interlocutory applications in Tanzania. In Butterworth on Costs at p. 97 there is this short paragraph:

“Where an interlocutory order is made for costs “to be paid”, the party entitled to costs may proceed to taxation of such costs forthwith, although the action may still be pending.”

Counsel for the respondents has argued that if costs for interlocutory matters are to be held over until final disposal of the suit great and irreparable hardship could be caused in certain circumstances, and he states that such a principle should not be followed which could lead to such results.

I will have to decide this matter without the assistance of any direct authorities in point, but on the whole I incline to the view that the practice of the Common Law Division Courts in England should be adopted. I keep also in mind the decisions of the courts in Kenya on similar matters. I hold that unless the court directs the immediate taxation and payment of costs in an interlocutory application there should be only one taxation of costs in an action, and costs of an interlocutory application should be held over until the final disposal of the suit. It is undesirable to have to tax a number of bills of costs in an action.

In suitable instances a successful party can apply for immediate taxation and payment of costs of an interlocutory matter so as to prevent hardship, or for reasonable cause. In this case there has been no order for payment, and I hold that the taxing officer was wrong to tax this bill of costs.

In the result it is not necessary to deal with the other matters objected to by the applicant. I remit the bill of costs back to the taxing officer for him to hold it over until final disposal of the suit, and I set aside the bill taxed by the taxing officer in the circumstances.

The application is allowed with costs.

Application allowed.

For the Applicant:

Tahir Ali & Co., Dar-es-Salaam

Tahir Ali

For the Respondent:

A. C. Beynon, Dar-es-Salaam

Marianne Ingrid Winther v Arbon Langrish and Southern Ltd
[1966] 1 EA 292 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	23 May 1966
Case Number:	735/1965
Before:	Harris J
Sourced by:	LawAfrica

[1] Negligence – Duty of care – Instructions to renew insurance – Insurance not renewed by insurance broker – Possibility that instructions misunderstood – Insurance of a special type – Assured relying on broker’s special skill and experience – Assured killed in accident – Claim for damages – Whether broken under a duty of care to renew insurance.

[2] Insurance – Broker’s duty of care – Instructions to renew insurances – Admitted liability personal accident policy – Insurance not renewed by broker – Possibility that instructions misunderstood – Insurance of a special type – Assured relying on broker’s special skill and experience – Assured killed in accident – Claim for damages – Whether broker under a duty of care in renewing insurance.

Editor’s Summary

The plaintiff was the widow and the administratrix of the will of W. who died in a flying accident on

August 3, 1964, when piloting a jointly owned aircraft and claimed damages for the alleged neglect of the defendant, an insurance broker, to renew a policy of insurance which had it been renewed would have entitled the estate of W. to a sum of £2,000. The policy of insurance was an admitted liability personal accident policy and covered the period May 8, 1963 to May 7, 1964 and for such further periods as might be agreed. The policy was originally issued to “the Gordon Highlanders” and related to a Piper Tri-Pacer aircraft but by an addendum dated March 23, 1964 and, with the agreement of a group of underwriters in London, the name of the assured was changed to those of F. and W. the new joint owners. Under this policy the passengers of the aircraft, including the pilot were entitled to a sum of £2,000 in the event of death resulting from bodily injury. There was also in existence during this period another policy of insurance, the “hull policy”, which was similarly acquired and which covered physical damage to the aircraft, liability to the public and to passengers but afforded no cover to the pilot. Both the policies

were due to expire on May 7, 1964, and C, manager of the defendant wrote to F informing him of this and suggested a discussion of the policies prior to the renewal date. It was alleged that on May 4, 1964, the plaintiff called on C and gave him definite instructions to renew the policies. On May 5, C for the defendant, sent a cable to its London representatives with directions to renew the hull policy and said he would advise later as regards the admitted liability policy and subsequently on May 11, suggested that the latter policy should be allowed to lapse. On June 3, 1964, C wrote to F informing him that the hull policy had been renewed for a further twelve months. On June 15, both F and W called on C to ascertain the cover afforded by the policies and was assured that all was in order and on July 8, F received a further letter with a debit note for additional premium but not indicating whether it related to both insurances or to only one of them. It was common ground that the business of an insurance broker in regard to effecting or renewing of an aircraft insurance with the underwriters in London or elsewhere was a specialized class of insurance business and further that the defendant was the owners' agent for transferring the two policies to themselves, for advising them upon the policies and for renewing the hull policy. It was contended on behalf of the plaintiff that if she had instructed C to renew the policy in question and the latter owing to a genuine misunderstanding did not appreciate and accept her instructions and, as a result failed to renew the policy, the defendant was answerable for a breach of the duty to take care which arose from the general relationship existing between the parties.

Held –

- (i) the relationship of insurance broker and assured between the defendant and the owners gave rise to a duty of care on the part of the defendant independent of contract; *Hedley Byrne and Co., Ltd. v. Heller and Partners, Ltd.*, applied;
- (ii) in the circumstances of this particular case, the defendant had not sufficiently discharged the duty of care cast upon it and was answerable for the damage which resulted.

Judgment for the plaintiff.

[**Editorial Note:** In this case the court had found for the plaintiff on the main ground that there had been a breach of instructions to renew the admitted liability personal accident policy, but went on to discuss the alternative issue raised at the trial that in the special circumstances of this case there was a duty of care on the part of the defendant broker to renew the said policy. This case is only reported on the latter point.]

Cases referred to in judgment:

- (1) *Hedley Byrne & Co., Ltd. v. Heller & Partners, Ltd.*, [1964] A.C. 465; [1963] 2 All E.R. 575.
- (2) *Nocton v. Lord Ashburton*, [1914] A.C. 932, 972.
- (3) *Woods v. Martins Bank, Ltd.*, [1959] 1 Q.B. 55; [1958] 3 All E.R. 166.
- (4) *Candler v. Crane, Christmas & Co.*, [1951] 2 K.B. 164; 1 All E.R. 426.

Judgment

Harris J: Although the decision at which I have arrived is sufficient to dispose of this case there is an alternative ground upon which the plaintiff claims that she is entitled to succeed and to which I should

refer lest I be mistaken in my finding of fact that the defendant through Mr. Cowmeadow [its manager] accepted the plaintiff's instructions, given on May 4, to renew the admitted liability policy. If the true position be that the plaintiff instructed Mr. Cowmeadow to renew the policy but the latter, owing to a genuine misunderstanding did not appreciate and accept her instructions and, as a result, failed

to renew the policy, the plaintiff's contention, raised in this alternative ground, is that the general conduct of the defendant, viewed in the light of the relationship existing between the parties, amounted to a breach of the duty to take care which that relationship imposed upon the defendant in the premises, for which breach, if resulting in damage to the plaintiff, the defendant is answerable. This claim does not arise on the pleadings as they stand but in putting forward this proposition Mr. Le Pelley, as I understood his argument, relied upon the recent decision of the House of Lords in *Hedley Byrne & Co., Ltd. v. Heller & Partners, Ltd.* (1), and in particular upon a passage from the speech of Lord Devlin in that case. Counsel for the defendant raised no objection to the claim being put forward in this way but sought to distinguish *Hedley Byrne's* case (1) on the facts and contended that if there was an honest and bona fide misunderstanding on Mr. Cowmeadow's part, and therefore no undertaking by him to effect a renewal of the policy, there can be no liability on the part of the defendant entitled the plaintiff to succeed. There would appear to be no decision of the courts of this country bearing directly upon the question so raised and the matter calls for careful consideration.

Although the facts in that case are readily distinguishable from those now before me, the decision makes clear that, apart from any strict contractual obligation and notwithstanding the absence of consideration, there may exist at common law in appropriate circumstances what has been called a "duty of care" on the part of a person having dealings with another. After referring to a number of earlier decisions Lord Morris of Borth-y-Gest said ([1964] A.C., at p. 502):

"My Lords, I consider that it follows and that it should now be regarded as settled that if someone possessed of a special skill undertakes, quite irrespective of contract, to apply that skill for the assistance of another person who relies upon such skill, a duty of care will arise."

Similarly Lord Devlin after an examination of the authorities said (*ibid.*, at pp. 528 and 530):

"I think, therefore, that there is ample authority to justify your Lordships in saying now that the categories of special relationships which may give rise to a duty to take care in word as well as in deed are not limited to contractual relationships or to relationships of fiduciary duty, but include also relationships which in the words of Lord Shaw in *Nocton v. Lord Ashburton* (2) are 'equivalent to contract', that is, where there is an assumption of responsibility in circumstances in which, but for the absence of consideration, there would be a contract . . .

"I shall therefore content myself with the proposition that wherever there is a relationship equivalent to contract, there is a duty of care. Such a relationship may be either general or particular. Examples of a general relationship are those of solicitor and client and of banker and customer. For the former *Nocton v. Lord Ashburton* (2), has long stood as the authority and for the latter there is the decision of Salmon, J., in *Woods v. Martins Bank, Ltd.* (3), which I respectfully approve. There may well be others yet to be established. Where there is a general relationship of this sort, it is unnecessary to do more than prove its existence and the duty follows. Where, as in the present case, what is relied on is a particular relationship created ad hoc, it will be necessary to examine the particular facts to see whether there is an express or implied undertaking of responsibility."

This principle was also illustrated in *Candler v. Crane, Christmas & Co.* (4) where Denning, L.J. (as he then was) in a dissenting judgment which was subsequently approved in *Hedley Byrne's* case (1), after considering the position

of company promoters and trustees who answer enquiries about the trust funds, said ([1951] 2 K.B. 180):

“Those persons do not bring, and are not expected to bring, any professional knowledge or skill into the preparation of their statements: they can only be made responsible by the law affecting persons generally, such as contract, estoppel, innocent misrepresentation or fraud. But it is very different with persons who engage in a calling which requires special knowledge and skill. From very early times it has been held that they owe a duty of care to those who are closely and directly affected by their work, apart altogether from any contract or undertaking in that behalf.”

From the evidence in this case it is clear that the business of an insurance broker in regard to the effecting or renewing of aircraft insurance with underwriters in London or elsewhere is a specialized class of insurance business. It is common cause that the defendant was the agent of the owners and not of the underwriters and that the owners had transacted through the defendant all the business of transferring the two policies from the Gordon Highlanders to themselves and it is clear that they had looked to the defendant to advise them upon the policies and to effect the renewal of, at least, the hull policy. It is manifest that the defendant as an insurance broker, and Mr. Cowmeadow the manager of its Nairobi branch, each constituted a person possessed of special skill and experience in the matter of aircraft insurance, that in all their dealings in this matter they must be assumed to have undertaken to apply that skill and experience for the benefit and assistance of the owners and, on May 4, 1964, of the plaintiff as the latter's emissary, and that the three last-named persons relied upon the defendant in that regard.

In these circumstances I am of the opinion that the relationship which existed between the defendant and the owners attracted the application of the principle in *Hedley Byrne's* case (1) and that, independently of contract, a duty of care arose. What was the extent of that duty and was the duty discharged?

The extent of such a duty would appear to depend upon a number of factors including in the present case the degree to which the owners may reasonably be said to have been, to the knowledge of the defendant, in the position of having to rely upon the defendant to ensure that they were made aware, so far as was necessary for their purpose, of the practical implications of aircraft insurance and that their requirements in the matter were attended to, and in this connection it should be borne in mind that, as Mr. Cowmeadow must be assumed to have known, the owners fell within the category of novices. Can it be said then that the duty of care owed to such persons was discharged by the defendant to the extent and with that degree of diligence properly to be imputed to it?

Notwithstanding the element of uncertainty as to the owners' instructions that must have been in Mr. Cowmeadow's mind when on May 11, he merely suggested to his London representative that the policy be allowed to lapse instead of giving a firm direction, he took no step at any time to remove the uncertainty by seeking clarification of those instructions. Furthermore he omitted to inform either the plaintiff or the owners, as prudence would have suggested, of the fact that, having failed to contact the Nakuru Club and despite having received no further instructions from the plaintiff or the owners, he had caused the policy to lapse with effect from midnight on May 7. Lastly Mr. Cowmeadow, in his evidence, stated that the practice obtaining in Nairobi in regard to aircraft insurance is that cover is effected through a representative, normally in London, and that, although with a new client he has to await receipt of a reply from his representative, in the case of an existing client cover can be given as from the time of his sending a cable to London. There was no suggestion that in the present case the owners were not existing clients for this

purpose and it is clear that cover under the new hull policy had been effectively secured by the mere sending of the cable to London on May 5, although neither the precise terms of the policy nor the rate of premium had at that stage been determined. Nevertheless when Mr. Cowmeadow eventually came to realise, as he had done when he wrote to his London representative on June 16, that an admitted liability policy was also required, he took no action either to obtain temporary cover, as he had done with the hull insurance, or to warn the owners that he was not doing so and that they would remain for the time being uninsured. Had they been made aware of the situation they might well have taken steps to rectify the position rather than face the risk of being killed or injured without the provision of that cover for their dependants which it was one of the purposes of the admitted liability policy to provide.

The question raised is one of difficulty for the extent of the duty of care must vary according to the circumstances of each case, but having given to it the most careful consideration I am driven, for the reasons which I have stated, to the conclusion that, in the circumstances of this particular case, the defendant did not sufficiently discharge the duty of care cast upon it and that upon this ground also, the plaintiff is entitled to succeed.

Judgment for the plaintiff.

For the plaintiff:

Archer & Wilcock, Nairobi

J. Le Pelley

For the defendant:

Macdougall & Wollen, Nairobi

R. Sampson

Practice Notes 1957

Practice Note 1/57: E.A.C.A. Rules 1954, Rule 62 (1)

It is observed that in many recent appeals the memorandum has been extremely long, setting out the grounds of appeal in detail or at great length. The memorandum should set out the grounds of appeal shortly and simply. The broad issues to be raised should be stated but not the detailed reasons in support of them.

Advocates are reminded that if the Court is of the opinion that a memorandum of appeal is prolix the costs of drawing and copying it may be disallowed.

Practice Note 2/57: Hearing Dates

When an appeal has been listed for hearing, whether by consent or otherwise, and is included in the Cause List, it will not be taken out except for special reasons, even though all parties consent. Applications to take out an appeal by consent will only be considered if they are made in writing and signed by all parties, or are accompanied by letters from all other advocates in the appeal agreeing to that course. Such applications should, if possible, be filed in the Registry not less than three days before the date fixed for hearing.

Practice Note 3/57

In civil and criminal appeals where a shorthand note has been taken of the evidence and forms part of the record, the transcript must always contain a certificate of the accuracy of the transcript signed by the shorthand writer.

Practice Note 4/57: E.A.C.A. Rules 1954, Rule 81

Confusion still seems to exist about the correct procedure on extracting an order of this Court.

The party having the carriage of the order, normally the successful party on the appeal, must prepare the first draft, and this should be done immediately after delivery of the judgment. The preparation and approval of orders is a function of the “solicitor” on the record and not of “counsel” as such. Accordingly the advocates who appear on the record will prepare the draft and submit it for approval to the advocates for the other party or parties. (If a copy is sent as a matter of courtesy to leading counsel this is merely for information and does not affect the basic procedure.) The draft sent to the other party, or parties, should be clearly endorsed with the name of the advocates or firms to whom it is sent, followed by the words “for approval”, the signature of the advocate or firm sending the draft, and the date. Where the draft is to go to more than one other advocate or firm it must be sent first to the firm first-named and by them amended if necessary and signed either as approved or approved as amended. It should then be sent directly by them to the next advocate or firm referred to in the original endorsement, so that each in turn has the opportunity to amend and sign. The last mentioned firm will return it to those who originally drew it for consideration of any amendments and submission by them to the Registrar. In future, the Registrar will refuse to consider any draft order unless this has been done, or evidence is produced to him that another party has refused or omitted to comply.

If the parties are agreed on the form of the order this will be apparent on the face of the draft, if the above procedure is followed, since the party who prepared the draft must note either that amendments are agreed or not agreed. If on the other hand the parties are not agreed as to the form of the draft, it should be apparent from the single document what form each party thinks the order should take.

There may be cases in which amendments would be so extensive that it is more convenient for the opposite party to prepare an entirely new draft. Where this is done it should be annexed to the original draft and clearly identified by an appropriate note and signature. It is not necessary to give reasons either for amendments made or for rejection thereof. The reasons are usually self-evident.

No appointment will be made for a judge to settle an order unless it is clear that this procedure has been properly observed, or the Registrar is satisfied that some party is “in default”.

It is necessary to stress that the approval or amendment, as the case may be, of a draft order submitted is always a matter requiring immediate attention. If it cannot be done within a very short time say forty-eight hours, an explanation should be given by correspondence.

If the person having the carriage of an order does not take prompt steps to extract it, any other party may do so, using the above procedure *mutatis mutandis*. It is desirable, however, before doing this to invite by letter the person having the carriage to take immediate action.

Practice Notes 1958

Practice Note 1/58: Costs – E.A.C.A. Rules 1954, Third Schedule, Para. 15

In some recent appeals the provisions of the above paragraph have not been observed by the advocate

for the successful party when filing and taxing his bill of costs.

Notice is given that the Taxing Officers of this Court will in future insist that this paragraph be observed.

Practice Note 2/58: Costs – Fees to Counsel

Where it is desired to tax in this Court any sum as a disbursement for fees paid to counsel, and the instructions to counsel in respect thereof are given at any time after June 1, 1958, the taxing officer will require that, in addition to counsel's receipt, the brief with a dated backsheets, or, at least, a dated backsheets, showing the work to be done by counsel and endorsed with the fee agreed to be paid therefor, should be produced. It is requested that counsel whatever other papers (if any) are delivered with his instructions, will treat the delivery of such a backsheets as being essential as a matter of etiquette in every case, unless emergency renders this impossible, in which case the backsheets should be delivered within forty-eight hours.

Practice Note 3/58: Costs – Trustees

Taxing Officers of this Court, when taxing the bills of costs of trustees, will in future do so in accordance with the principles laid down in *re Grimthorpe's* (Baron) *Will Trusts* [1958] 1 All E.R. 765. Counsel appearing for trustees should remind the Court of the special form of order required.

Practice Notes 1959

No practice notes were issued during this year.

Practice Notes 1960

Practice Note 1/1960: E.A.C.A. Rules 1954, Rule 9 (3)

Applications under this rule must be accompanied by a letter of consent to the extension applied for, and the letter should be addressed to the Registrar, and not to the advocates for the applicant.

Practice Notes 1961

Practice Note 1/1961: Costs – E.A.C.A. Rules 1954, Third Schedule, Para. 15

Advocates are again reminded that failure to comply with para. 15 of the third Schedule to the E.A.C.A. Rules, 1954, may result in the loss of fees for preparing documents, the fee for which is charged for by the folio, and of disbursements when vouchers or receipts are not produced.

Practice Note 2/1961: E.A.C.A. Rules 1954, Rule 19 (6) – (Reference to the full Court)

Any person aggrieved by a decision of a single Judge who desires to have his application in a criminal matter determined by the full Court under para. (a) of s. 14 of the Eastern African Court of Appeal Order in Council, 1950, or to have the decision in a civil matter varied, discharged or reversed under para. (b) of the said section should, in addition to giving notice, pursuant to r. 19 (6) of the Eastern African Court of Appeal Rules, 1954, of such desire to the Judge or Registrar within seven days after the decision complained of, serve, or arrange for service by the Registry of, a copy of such notice if given in writing, or a notification thereof if given orally, on all other parties (if any) to the application and, in due course,

notify all such parties in writing of the date and time fixed for the hearing of such reference by the full Court.

Practice Note 3/1961: Preparation and Certification of Records

Cases have occurred recently where records have been presented for filing which do not agree with the copies of proceedings supplied to advocates. These records have been certified by advocates as being correct and it seems apparent that these certificates must have been given without the advocate having checked the record.

It is notified for general information that in future cases where this happens and the appellant is successful, the Court will disallow all or part of the costs of preparing the record.

Practice Notes 1962

Practice Note 1/1962: Hearing Dates

Once an appeal is fixed for hearing it will not be taken out of the list, even with the consent of both parties, unless it is settled or good reasons for so doing are shown to the satisfaction of the Court.

Should the Court permit an appeal to be taken out of the list, it will be put at the end of the waiting list, unless the Court orders otherwise.

Practice Notes 1963

No practice notes were issued during this year.

Practice Notes 1964

Practice Note 1/1964: Form of Applications – E.A.C.A. Rules 1954, Rule 19

The Court will in future require precise compliance with r. 19 of the East African Court of Appeal Rules, 1954.

All applications to the Court, unless made informally in the course of the hearing of an appeal and not involving the decision of an appeal should be made by motion supported by an affidavit stating the grounds of the application. The hitherto prevalent practice of making applications to the Court by way of notice is hereby discontinued.

Practice Notes 1965

No practice notes were issued during this year.

Practice Notes 1966

No practice notes were issued during the period from January to August, 1966.

Uganda v Raimondo Alindubo and another
[1966] 1 EA 301 (HCU)

Division: High Court of Uganda at Kampala
Date of judgment: 23 September 1966
Case Number: 372/1966
Before: Sir Udo Udoma CJ
Sourced by: LawAfrica

[1] Criminal law – Trial – Joint trial of separate charges of committing adultery – One transaction – Whether joint trial fatal to conviction.

[2] Criminal law – Practice – Irregular to consolidate charges for joint trial.

Editor's Summary

The two accused were charged on two separate charges of committing adultery with each other contrary to s. 150A (1) and s. 150A (2) of the Penal Code. They were tried summarily together and convicted on their own pleas. The acting chief magistrate then applied for the conviction to be set aside on the ground that it was wrong in law for both accused to have been tried jointly on two separate charges.

Held –

- (i) it is a fundamental rule that separate charges, whether or not against one person or whether taken summarily, cannot be consolidated for a joint trial;
- (ii) the magistrate had no jurisdiction to try the accused persons jointly and the trial was a nullity ab initio.

Appeal allowed. Convictions quashed and sentences set aside.

Cases referred to in judgment:

- (1) *R. v. McDonnell* (1928), 20 Cr. App. Rep. 163.
- (2) *R. v. Crane* (1921), 15 Cr. App. Rep. 23.
- (3) *R. v. Wilde* (1933), 24 Cr. App. Rep. 98 (C.C.A.).
- (4) *R. v. Samuel Adiukwu and Others and R. v. Richard Onwusamaonye* (1939), 5 W.A.C.A. 132.
- (5) *R. v. Joseph Williams and Another* (1943), 9 W.A.C.A. 204.
- (6) *Jonah Arisah and Another v. Commissioner of Police* (1948), 12 W.A.C.A. 297.

Judgment

Sir Udo Udoma CJ: In this application the acting chief magistrate, Gulu, has submitted that the conviction of the two accused persons Raimondo Alindubo and Bianika Debua by the magistrate, grade III, Ayivu Magistrates' Court, be set aside as the same is wrong in law in that both accused, having been charged separately in two separate charges, were irregularly tried together by the magistrate.

The Director of Public Prosecutions has written to say that he supports the conviction and sentences but has advanced no reason for his stance.

The two accused persons were charged separately in two separate charges of adultery alleged to have been committed on March 8, 1966. The charge against the first accused was as follows:

“Uganda v. Raimondo Alindubo of Oluku village Ayivu Division, etc.

Statement of Offence

Adultery contrary to s. 150a (1) of the Penal Code.

Particulars of Offence

Raimondo Alindubo on March 8, 1966, at Oluku village at about 3 p.m.

in the W.N.D. had sexual intercourse with a married woman called Bianika being not your wife.”

And the one against the second accused was in the following terms:

“Uganda v. Bianiko Debua of Riki Village, Ayivu Division, etc.

Statement of Offence

Adultery contrary to s. 150a (2) of the Penal Code.

Particulars of Offence

Bianika Debua on March 8, 1966, at Riki Village at about 3 p.m. had sexual intercourse with another man called Raimondo being not her husband.”

At this juncture, I pause to note in parenthesis that in the first charge against the first accused it is alleged that the first accused had committed adultery at Oluku village on March 8, 1966, at 3 p.m.; and in the charge against the second accused the allegation is that she had committed adultery with one Raimondo, not her husband, on March 8, 1966, at Riki village at about 3 p.m. The two charges thus raise a serious issue of fact, namely as to whether the two charges were concerned with the same offence, or were intended to represent two different offences since the offences are alleged to have been committed at two different villages on the same day and at the same time. There is nothing on the record to show whether Oluku village and Riki village are one and the same village but with two different names. The irrebuttable presumption must be that the two villages are different.

On July 8, 1966, both accused appeared before the magistrate grade III. The court then decided to and did try both accused together even though separately charged on different charges. This point deserves emphasis in view of the fact that the offence or offences were said to have been committed in two different villages. Thus the two accused persons were tried jointly despite the fact that they were separately charged. It should also be observed that this was not a question of joining two separate counts in one charge against two individuals.

It is clear that what the magistrate did was to consolidate and try the two separate cases together. In the record of proceedings the two charges are clearly shown on two separate charge sheets and form part of the record so that there can be no room for doubt that there were in fact two separate charges. Each of the charges was read in turn to the particular accused concerned; and each of the accused also in turn pleaded thereto separately; and such pleas were recorded as guilty in each case. The accused were then found guilty by the magistrate on their respective pleas and convicted.

It may be noted as a matter of interest that the finding of the court was recorded as follows:

“*Decision:* Both accused have been found guilty of adultery contrary to s. 150a (1) for a man offender and 150a (2) for a woman offender – all of the Penal Code on their own pleas.”

As recorded it is plain that the magistrate had treated the two separate and distinct charges as if they were counts of the same charge. That of course was not the true position, which was that the two charges were quite separate and distinct.

The acting chief magistrate now complains that the decision of the trial magistrate was wrong in law because the two accused persons, having been separately charged on two separate charge sheets, ought not to have been tried jointly. I think this objection is properly and correctly raised. I agree with the acting chief magistrate that the trial magistrate committed an error in law by

trying the two accused persons jointly and on two separate charges laid under two separate subsections of s. 150A of the Penal Code, thereby treating the charges as if they were counts in one charge.

I think I am right in stating that as a general rule of law criminal or penal charges against separate individuals separately charged cannot be consolidated and tried together. Consolidation of two separate criminal charges and a joint trial of such charges are such a fundamental irregularity that the whole of the proceedings of such a trial must be considered vitiated. For there can be no consolidation of criminal cases or even of criminal appeals. There is no rule in our Criminal Procedure Code which authorises a court to consolidate two different criminal charges in the same way as two civil cases may be consolidated and tried together. This rule of nonconsolidation of criminal charges also holds good where one person is committed for trial on two separate indictments. Charges on two indictments, although they may concern one and the same person, cannot properly be tried together.

The objection raised in this case by the acting chief magistrate is of considerable importance in law as it concerns the power of the courts to consolidate and try together two separate charges not counts in the same charge against two different individuals separately charged or indicted. Similar objections had been raised, considered and sustained in a number of cases in other courts in the Commonwealth. I shall content myself with referring to only two countries of the Commonwealth, where similar objection was sustained.

In *R. v. McDonnell* (1) which is an English case, the appellant therein had been convicted on December 3, 1927, at the Maidstone Borough Sessions of stealing a bicycle at Folkestone and sentenced by the Recorder to three months' imprisonment.

There were no merits at all on the facts of the case but it happened that when the appellant was arrested there was a parcel of clothing found near the bicycle and a charge of stealing the parcel of clothing was made the subject of another indictment. There were therefore two indictments, one for stealing the bicycle and one for stealing the clothes. No-one appeared to have been aware of the existence of the two separate indictments, and the case proceeded as if there had been two counts in one indictment.

The jury found the appellant guilty of stealing the bicycle but not guilty of stealing the clothing. On appeal the Court of Appeal held that it was impossible to resist the conclusion that the whole trial was a mere nullity. Further that the same was covered by *R. v. Crane* (2). The court refused to grant a new trial. The conviction was quashed.

In *R. v. Robert Wilde* (3), another English case, the appellant therein was charged on two indictments, which were tried together; and he was convicted on both. It was held that the trial was a nullity and that in the circumstances of that case the court would not exercise the powers of ordering a venire de novo. The conviction was quashed.

The problem as to the effect of trying jointly two or more persons charged separately and on separate charges was also considered and dealt with in at least three Nigerian cases referred to hereunder.

In *R. v. Samuel Adiukwu and Others and R. v. Richard Onwusamaonye* (4) – consolidated cases, the case against the first three accused persons was originally a separate one, numbered A/128 and C/1939, in which they were committed for trial on charges of conspiracy to bring false accusation contrary to s. 123 of the Nigerian Criminal Code; preparation for coining contrary to s. 148(3)(a) of the said Code; and possession of several counterfeit coins contrary to s. 152(1)(c) of the said Code. The fourth accused was,

as the judge stated in his

record of the trial, arraigned separately from the others (Case No. A/123, C/1939) on four different counts of counterfeiting silver coins contrary to s. 147 of the Nigerian Criminal Code; preparation for coining contrary to s. 148 (3)(a) and (d) and possession of several counterfeit coins contrary to s. 152(1)(c) of the said Code. The cases were consolidated and all accused were tried together.

The first two accused were convicted of conspiracy and preparation for coining; the third accused was acquitted on all three counts; and the fourth accused was found guilty on the first two and the last counts. The latter alone appealed to the West African Court of Appeal.

A preliminary point was taken that there had been a misjoinder. The learned Crown Counsel, who appeared for the Crown in the appeal, did not seek to support the irregularity of a simultaneous trial where persons had been separately committed for trial, and referred to *R. v. Crane* (2), in which it had been definitely established that defendants indicted separately cannot in law be tried jointly; such a proceeding was held to be a mistrial and a venire de novo was awarded. The fact that there were separate indictments was in the latter case only discovered after the appellant had given notice of appeal. In view of the decision in *R. v. Crane* (2) the West African Court of Appeal declared that the proceedings in the trial of the accused persons mentioned above were a nullity through want of jurisdiction.

In *R. v. Joseph Williams and Another* (5), another Nigerian case, there the appellant therein was committed for trial before the then High Court of Nigeria with another man on nine charges of stealing against each; and a charge of conspiracy against both. At the trial two charges of conspiracy in which the appellant had been separately committed were added. The appellant was acquitted on the charges of conspiracy and forgery; but on the count of stealing he was convicted of receiving.

It was held by the West African Court of Appeal that, although the trial had not been one on indictment, there had been a misjoinder and the trial was therefore a nullity. It was further held by the Court that there was no such thing as a consolidation of cases in a criminal trial; and that defendants separately committed, except possibly in the case of an information, could not be tried together.

In *Jonah Arisah and Another v. Commissioner of Police* (6), the circumstances in which appear to be on all fours with the circumstances of the instant case, it was held by the West African Court of Appeal that where accused persons are separately charged they cannot be tried together. If they are so tried the joint trial is a nullity.

There the charges upon which the appellants therein were convicted passed through many vicissitudes in the course of the hearing in the magistrate's court by amendment, alteration and addition, but throughout maintained the character of separate charges against each of the appellants involved individually as in the present case.

It appeared from the records that after arraignments and upon the charges coming on for hearing, the Police had asked that the two cases be tried together, there being the same facts and the same witnesses involved. Each appellant was represented by counsel, both of whom stated that they had no objection to the Police request and agreed that both cases be tried together. The trial was thereupon commenced and concluded.

The facts and circumstances which emerged from the evidence were that there was at no time a joint charge. Each of the appellants was charged in the first instance with attempt to extort £50 from one Ephraim Onyekwelu. The charges were subsequently amended by the magistrate by the addition of more counts in each charge in which each of the accused was separately alleged to have committed an offence

contrary to s. 408 (2) of the Nigerian Criminal Code. The

two appellants were later convicted only on the two additional counts. An appeal to the High Court of Nigeria was dismissed but on a further appeal to the West African Court of Appeal the appeal was allowed on the ground that the trial was a nullity for want of jurisdiction.

It may be observed also that apart from the Nigerian case of *R. v. Joseph Williams* (5) which was a case tried summarily by a magistrate, all the other cases mentioned above were tried on indictments after due committal to the High Court concerned by committing magistrates and so they speak of indictments. Even so under our own Criminal Procedure Code the word “charge” and “indictment” appear to be synonymous and practically interchangeable (see for instance s. 133 of the Criminal Procedure Code), save and except that trials in the High Court are always on indictment.

In any case it is clear from the decisions above cited that it is immaterial for the purpose of the points involved in this case whether the instrument on which a person can be put on his trial is called an indictment or a charge. The result must be the same in any event as exemplified by the decisions referred to above.

On a careful consideration and having weighed, compared and contrasted the facts and circumstances present in the instant case with similar facts and circumstances in the cases cited above, I am persuaded that the important principle of law established by those authorities is so cogent and reasonable that it must be considered as fundamental and of universal appeal and therefore should be applied to the case under consideration. On that principle I am left in no doubt that the magistrate, grade III, had no jurisdiction to have tried the two accused persons, who were separately charged and on two separate charges. The trial was a nullity ab initio and it is here and now so declared. For always the important question to be asked and answered in a case of this kind is what was asked and answered by Avory, J., in *R. v. Crane* (2) when he remarked “Was there a trial at all in this case which can be recognised?. If they were not properly given in charge the Tribunal was not competent to try them”.

For the reasons given above, the conviction and the sentences imposed on the two accused persons are set aside. There will be no order for venire de novo as the Director of Public Prosecutions has not applied for one. Accused acquitted and discharged.

Appeal allowed.

Convictions quashed and sentence set aside.

Grace Stuart Ibingira and others v Uganda [1966] 1 EA 306 (CAK)

Division:	Court of Appeal at Kampala
Date of judgment:	14 July 1966
Case Number:	63/1966
Before:	Sir Clement de Lestang Ag P, Spry Ag VP and Law JA
Sourced by:	LawAfrica

Appeal from: The High Court of Uganda – Sir Udo Udoma, C.J., Sheridan and Fuad, JJ.

[1] Constitutional law – Uganda – Arrests made under Deportation Ordinance (Cap. 46) – Whether Ordinance void for being inconsistent with the provisions of the Constitution of Uganda – Deportation Ordinance (Cap. 46) – Constitution of Uganda (1962), s. 1, s. 19 and s. 28 (U.).

[2] Habeas corpus – Deportation – Appellants held in custody pending inquiry into question of deportation – Arrests made under Deportation Ordinance (Cap. 46) (U:) – Whether Ordinance void for being inconsistent with the provisions of the Constitution of Uganda – Deportation Ordinance (Cap. 46) (U.) – Constitution of Uganda (1962), s. 1, s. 19 and s. 28 (U.).

[3] Fundamental rights – Protection of freedom of movement – Deportation – Habeas corpus – Constitution of Uganda (1962), s. 28 (U.).

Editor’s Summary

The appellants had been held in custody pending a decision by the Minister concerned as to whether or not an order for their deportation should be made under the Deportation Ordinance (Cap. 46). On an application for a writ of habeas corpus the detention was challenged on the grounds that the Deportation Ordinance was void for inconsistency with the provisions of the 1962 Constitution of Uganda. Section 1 of the Constitution provides, with certain exceptions, that if any other law is inconsistent with the Constitution, the Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void. Section 19(1)(j) of the Constitution provides that no person shall be deprived of his personal liberty save as may be necessary in the execution of a lawful order. The High Court in dismissing the application held that the Deportation Ordinance fell squarely within s. 19(1)(j) and that a fortiori it did not infringe any other relevant provision of the Constitution. It was submitted by counsel for the appellants that the High Court had erred in looking at s. 19 to the exclusion of s. 28. He argued that s. 19 presupposed a lawful order which was not the case unless s. 28 had been complied with. On the other hand counsel for the State contended, inter alia, that an order of deportation was “authorised by law” within the meaning of s. 19(1) because it was made under statutory power and the statute was authorised by s. 19(1) itself; that “lawful” in para. (j) merely meant in compliance with the procedure prescribed by the statute, and that while paras. (a) to (d) related to judicial proceedings, paras. (e) to (j) related to executive or administrative action and did not specify the manner in which the liberty of the individual may be restricted or taken away.

Held –

- (i) the arguments on behalf of the State ultimately rested on the proposition that s. 19 of the Constitution authorised legislation for the restriction of the movement and residence of individuals, which in the view of the court was not so; all that para. (j) of s. 19 (1) did was to provide that lawful orders made under a statute restricting freedom of movement shall not constitute violations of the right to personal liberty;
- (ii) the appropriate section of the Constitution was clearly s. 28 and as the Deportation Ordinance as it stood did not fall within any paragraph of sub-s. (3),

at least so far as it purported to affect citizens of Uganda, it contravened the section and was in violation of the right of freedom of movement; therefore,

- (iii) no lawful order could be made against a citizen of Uganda under the Ordinance and since any order that might be made would be unlawful, para. (j) of s. 19 (1) could have no application.

Appeal allowed. Order of High Court set aside. Proceedings remitted to High Court with a direction that a writ of habeas corpus be issued as prayed.

No cases referred to in judgment.

Judgment

Spry Ag VP, read the following judgment of the court.

This is an appeal from an order of the High Court of Uganda, dismissing an application for a writ of habeas corpus. The appeal is concerned with a single question, whether the Deportation Ordinance (Cap. 46) (to which we shall refer as the Ordinance) is to be regarded as void, as being inconsistent with those provisions of the 1962 Constitution of Uganda (to which we shall refer as the Constitution), which relate to the fundamental rights and freedoms of the individual.

There can be no doubt that if there is such inconsistency, then, to the extent of the inconsistency, the Ordinance is void. This is expressly provided in s. 1 of the Constitution, which reads:

- “1. This Constitution is the supreme law of Uganda and, subject to the provisions of s. 5 and s. 6 of this Constitution, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void.”

It was argued in the High Court that the Ordinance had expressly been saved by s. 4 of the Uganda (Independence) Order in Council, 1962. The learned judges rejected that submission, relying on s. 1 of the Constitution, and we think, with respect, that they were undoubtedly correct. The qualifications in s. 4 of the Order in Council and the provisions of s. 9 lead to the same conclusion.

If the submissions made on behalf of the appellants are correct, the Ordinance is, of course, only void to the extent that it is inconsistent with the Constitution but the inconsistencies that are alleged are of so fundamental a nature that a finding in favour of the appellants would, for all practical purposes, amount to a finding that the Ordinance was abrogated by the enactment of the Constitution.

Briefly, the Ordinance empowers the deportation of any person from one part of Uganda to another part. There is no right of appeal from an order of deportation and an order remains in force until varied or rescinded. So long as an order remains in force, the deportee may not leave the part of Uganda to which he has been deported and he may be subject to various other restrictions.

Before an order of deportation may be made, there must be an inquiry held by a judge, who must furnish a report to the Minister. The proposed deportee has the right to be present at the inquiry and may be represented by counsel. Affidavit evidence may be admitted and if the Attorney-General so certifies the identity of the deponent and any facts that might tend to disclose such identity may be withheld and the deponent is not liable to cross-examination. The judge reports to the Minister and the report is not communicated to anyone other than the Minister except by his authorisation. In deciding whether or not to make an order of deportation, the Minister is not bound by any finding or recommendation that the

judge may have made.

The main arguments before the High Court and before us were based on s. 19 and s. 28 of the Constitution, the relevant parts of which read as follows:

“19(1) No person shall be deprived of his personal liberty save as may be authorised by law in any of the following cases, that is to say:

- (j) to such extent as may be necessary in the execution of a lawful order requiring that person to remain within a specified area within Uganda or prohibiting him from being within such an area, or to such extent as may be reasonably justifiable for the taking of proceedings against that person relating to the making of any such order, or to such extent as may be reasonably justifiable for restraining that person during any visit that he is permitted to make to any part of Uganda in which, in consequence of any such order, his presence would otherwise be unlawful.

28(1) No person shall be deprived of his freedom of movement, and for the purposes of this section the said freedom means the right to move freely throughout Uganda, the right to reside in any part of Uganda, the right to enter Uganda and immunity from expulsion from Uganda.

- (2) Any restriction on a person's freedom of movement that is involved in his lawful detention shall not be held to be inconsistent with or in contravention of this section.
- (3) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision:
 - (a) for the imposition of restrictions, by order of a court, that are reasonably required in the interests of defence, public safety or public order on the movement or residence within Uganda of any person;
 - (b) for the imposition of restrictions, by order of a court, on the movements or residence within Uganda of any person either in consequence of his having been found guilty of a criminal offence under the law of Uganda or for the purpose of ensuring that he appears before a court at a later date for trial of such criminal offence or for proceedings preliminary to trial or for proceedings relating to his extradition or other lawful removal from Uganda;
 - (c) for the imposition of restrictions that are reasonably required in the interests of defence, public safety, public order, public morality or public health on the movement or residence within Uganda of persons generally, or any class of persons, and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society;
 - (d) for the imposition of restrictions on the freedom of movement of any person who is not a citizen of Uganda;
 - (e) for the imposition of restrictions on the acquisition or use by any person of land or other property in Uganda;
 - (f) or the imposition of restrictions upon the movement or residence within Uganda of public officers; or
 - (g) or the removal of a person from Uganda to be tried outside Uganda for a criminal offence or to undergo imprisonment in some other country in execution of the sentence of a court in respect of a criminal offence under the law of Uganda of which he has been convicted.
- (4) If any person whose freedom of movement has been restricted by the order of a court by virtue of such a provision as is referred to in sub-s. (3)(a) of this section so requests at any time during the period of that restriction not earlier than six months after the order was made or six months after he last made such request, as the case may be, his case shall

be reviewed by that court or, if it is so provided by law, by an independent and impartial tribunal presided over by a person appointed by the Chief Justice.

- (5) On any review by a court or a tribunal in pursuance of sub-s. (4) of this section of the case of any person whose freedom of movement has been restricted, the court or tribunal may, subject to the provisions of any law, make such order for the continuation or termination of the restriction as it may consider necessary or expedient.”

We should perhaps explain, for the sake of clarity, that at the time of the hearing before the High Court, no order of deportation had been made: the appellants were held in custody pending the Minister’s decision whether or not such an order should be made. It is, we think, clear that, whatever the Minister’s decision might eventually be, the appellants could properly be held in custody if a valid order of deportation was capable of being made; if, however, the Ordinance was void as conflicting with the Constitution and consequently a valid order could not be made under it, then clearly their detention while the exercise of a non-existent power was being considered would be unlawful.

The learned judges in the High Court said:

“We are of the opinion that where a person is detained in custody by virtue of a lawful order issued by a competent authority, an order which does not infringe the protection of the right to a person’s liberty afforded by s. 19 of the Constitution, then the protection of the freedom of movement provided by s. 28 becomes irrelevant because of the express provisions made by sub-s. (2) of that section. We do not accept Mr. Masika’s submission that the applicants should be regarded as a ‘class of persons’ within the meaning of s. 28(3)(c).”

and later

“We do not doubt that the Deportation Ordinance could, in certain circumstances, lend itself to abuse and is unsatisfactory in some respects, but we are of the opinion that the Deportation Ordinance falls squarely within the provisions of para. (j) of sub-s. (1) of s. 19 of the Constitution, and does not infringe any other relevant provision of the Constitution. We therefore hold that neither the Deportation Ordinance nor any material part thereof is void as being inconsistent with any of the provisions of the Constitution.”

Counsel for the appellants, submitted that the learned judges of the High Court had erred in looking first at s. 19 and, being satisfied that it authorised the detention of the appellants, virtually ignoring s. 28. He argued that paras. (a) and (b) of sub-s. (3) of s. 28 permit legislation providing for the restriction of the movements of individuals but only where the orders are to be made by courts. Paragraph (c) relates to restrictions on the general public or classes of persons and does not permit the restriction of individuals. (Here, we may observe in passing that we respectfully agree with the learned judges that the appellants cannot be regarded as a class of persons). As regards para. (d), it has never been suggested that the appellants are other than citizens of Uganda. Paragraphs (f) and (g) have obviously no relevance. Therefore, in counsel for the appellants’ submission, any statute which purports to allow the restriction of individuals who are citizens of Uganda, not being within the exceptions set out in sub-s. (3), offends against s. 28 and is consequently void.

Counsel for the State argued that the human rights set out in Chapter 3 of the Constitution are set out in the order of their importance and that so far as any two overlap the less grave yield to the more grave: thus a person who

forfeits his right to life cannot complain that he is incidentally deprived of his liberty and a person who forfeits the right to liberty cannot complain that he is losing his freedom of movement. While there is merit in this argument, it is unnecessary for us to consider how far it is valid, as the relationship of s. 19 and s. 28 is expressly governed by para. (j) of s. 19 (1), which provides that lawful orders under a statute restricting freedom of movement are not to be regarded as in contravention of the right to personal liberty, and sub-s. (2) of s. 28, which provides that the restriction on a person's freedom of movement which is inherent in his lawful detention is not to be regarded as in contravention of the right to freedom of movement.

Counsel for the State submitted that an order of deportation is "authorised by law" within the meaning of s. 19 (1), because it is made under statutory power and the statute, that is, the Ordinance, is authorised by s. 19 (1) itself. He submitted that "lawful" in para. (j) of that subsection merely means in compliance with the procedure prescribed by the statute. He argued further that while paras. (a) to (d) relate to judicial proceedings, paras. (e) to (j) relate to executive or administrative action and do not specify the manner in which the liberty of the individual may be restricted or taken away.

We cannot accept these arguments. Ultimately, they depend on the proposition that s. 19 authorises legislation for the restriction of the movements and residence of individuals. In our view, it does not do so. All that para. (j) does, as we have said, is to provide that lawful orders made under a statute restricting freedom of movement shall not constitute violations of the right to personal liberty. To decide whether such a statute accords with the Constitution, it is, however, necessary to look at the appropriate section of the Constitution, which is, we think, clearly s. 28. On this question, we accept the appellants' arguments. We cannot see that the Ordinance as it stands falls within any paragraph of s. 28 (3) and we think, therefore, that, at least so far as it purports to affect citizens of Uganda, it contravenes s. 28 and is in violation of the right of freedom of movement. If that is so, it follows that, at least to that extent, it was abrogated by the coming into force of the Constitution, immediately before October 9, 1962. It follows necessarily that no lawful order can be made against a citizen of Uganda under the Ordinance and since any order that might be made would be unlawful, para. (j) of s. 19 (1) can have no application. This appeal must therefore succeed.

In view of this decision, it is unnecessary fully to consider counsel for the appellants' second argument, that s. 24 of the Constitution applies. We may say, however, that we incline to the opinion that s. 24 has no relevance and we note, in this connection, that State counsel's observation that there is no allegation that any of the appellants has committed any criminal offence.

It may be that the Ordinance was inconsistent with an earlier Constitution but no such submission was made to us and it is unnecessary for us to consider it.

We have considered what is the appropriate order for us to make, as to which no representations were made to us. We think we should set aside the order of the High Court and remit the proceedings to that Court with a direction that a writ of habeas corpus be issued as prayed. It is accordingly so ordered. The appellants are to have their costs in this Court and in the Court below.

Appeal allowed. Order of the High Court set aside. Proceedings remitted to High Court with a direction that a writ of habeas corpus be issued as prayed.

For the appellants:

J. W. R. Kazzora, Kampala

P. J. Wilkinson, Q.C., and J. W. R. Kazzora

For the respondent:

The Attorney General, Uganda

G. J. Masika (State Attorney, Uganda)

Harihar Chotabhai Patel v Uganda
[1966] 1 EA 311 (CAK)

Division:	Court of Appeal at Kampala
Date of judgment:	8 September 1966
Case Number:	222/1965
Before:	Sir Charles Newbold, P Spry and Law JJA
Sourced by:	LawAfrica
Appeal from:	The High Court of Uganda – Russell, J.

[1] Bankruptcy – Offence – Failure to keep proper books of account – Magistrate’s conclusion that omission had been honest and excusable – Burden on accused to show on balance of probabilities omission honest and excusable – Bankruptcy Act, (Cap. 71), s. 140 (1), proviso (b) (U.).

[2] Appeal – Jurisdiction – Questions of law and fact – Second appeal – Bankruptcy offence.

Editor’s Summary

The appellant was charged with failing to keep proper books of account within a period of three years prior to the date of the presentation of a bankruptcy petition contrary to s. 140 (1) of the Bankruptcy Act. It was conceded that during the material period proper books had not been kept and the sole question which arose for consideration by the resident magistrate was whether the omission to keep proper books came within the proviso to s. 140 (1) which provides that such omission shall not be an offence if it is honest and excusable. The resident magistrate came to the conclusion that the omission had been honest and excusable. On appeal to the High Court, the judge, while not interfering with the finding that the omission was honest, held that on the facts before the resident magistrate it was not reasonably possible to hold that the omission was excusable. He allowed the appeal and remitted the case to the resident magistrate for conviction and sentence. On further appeal by the appellant to the Court of Appeal, it was submitted that the High Court had no jurisdiction to interfere with the decision of the resident magistrate as the right of appeal lay only on a point of law and the question whether the omission was excusable was one of fact and not of law.

Held –

- (i) the onus was on the accused to show on the balance of probabilities that the failure to keep proper books was excusable;
- (ii) having regard to the period over which the default took place, the scale of the business and the

financial position of the appellant following the period when the books were apparently kept properly, the reasons for the failure to keep proper books were vague and unsatisfactory;

- (iii) the court was satisfied that there were no facts before the resident magistrate upon which he could reasonably have come to the conclusion that the omission was excusable and accordingly his decision was erroneous in law and the High Court had jurisdiction to rectify that error.

Case remitted to the Resident Magistrate for conviction and sentence as directed by the High Court.

No cases referred to in judgment.

Judgment

Sir Charles Newbold P, gave the following judgment of the court: This is a second appeal, being an appeal from the decision of a judge of the High Court given on an appeal from a decision of the resident magistrate, Busoga.

The appellant was charged with failing to keep proper books of account within a period of three years prior to the date of the presentation of a bankruptcy petition, contrary to s. 140 (1) of the Bankruptcy Ordinance. It was conceded that during almost all that period proper books had not been kept and the sole question which arose for consideration by the resident magistrate was whether the omission to keep proper books came within the proviso to s. 140 (1), which provides that such omission shall not be an offence if it is honest and excusable. We should here draw attention to the fact that the onus was on the accused, i.e. the appellant, to prove that the circumstances in which he failed to keep proper books were such that the omission was honest and excusable. On the facts proved before the resident magistrate, he came to the conclusion that the omission had been honest and excusable. The judge of the High Court was not prepared to interfere with the finding that the omission was honest but came to the conclusion that on the facts before the resident magistrate it was not reasonably possible to hold, as the resident magistrate had held, that the omission was excusable. He therefore allowed the appeal and remitted the case to the resident magistrate for conviction and sentence of the appellant. From that decision of the High Court this appeal has now been brought to this court.

This appeal, as we have already pointed out, is a second appeal and lies only on a question of law. Counsel for the appellant has submitted that the High Court judge had no jurisdiction to interfere with the decision of the resident magistrate as the judge himself only had jurisdiction on a point of law, the appeal having been brought under s. 325 of the Criminal Procedure Code Act. If, on the facts before the resident magistrate, it was reasonably possible to draw the inference that the omission was excusable, the question whether it was excusable would be one of fact and not of law and therefore the judge would have had no jurisdiction to interfere with the decision.

The question before us is this – on the facts proved before the resident magistrate was it reasonably possible to come to the conclusion that the omission in the circumstances of this case to keep proper books during the period mentioned in the charge was excusable? In order to arrive at the answer to this question it is necessary to set out the relevant facts. The outline of the facts proved before the resident magistrate was that books were properly kept and audited up to June, 1959. After that date the appellant was in financial difficulty, which apparently deepened until a petition in bankruptcy was presented in 1962. During this period, i.e. from June, 1959 to 1962, some, but not adequate, books were kept up to the beginning of 1961 and no books at all were kept thereafter. The reasons that the appellant gave were that the person who had been keeping the books left and then he asked a relative to keep them. This relative kept some accounts for the beginning of the period and then thereafter none at all, i.e. only for the first part and not for the latter part. From these facts it would seem quite clear to us that the appellant knew that the books were not being kept properly and yet he appears to have done nothing to remedy the default. He said in an unsworn statement that having regard to the nature of his business, he thought the accounts kept by his two main customers would be sufficient. We must also point out, as has already been said, that the onus under the section is to satisfy the court that the omission was excusable. This onus can of course be satisfied on a balance of probability; nevertheless there is an onus upon the appellant and not, as in most criminal cases, on the prosecution. We would like to draw attention to this fact because the defence relied only on an unsworn statement and it would normally be difficult to discharge an onus purely by means of an unsworn statement which cannot be tested by cross-examination. The resident magistrate, after examining the facts, came to the conclusion that the omission was not shown to be grossly negligent. This appears to be a misdirection as to the onus, as the resident magistrate seems to have approached

the facts on the basis that it was for the prosecution to prove the appellant's negligence in failing to keep his books. That is a misdirection in law as it was for the appellant to show that the omission was excusable. It may be that it was for these reasons that the magistrate came to the conclusion which he did. When the judge examined such facts as had been proved he came to the conclusion that there were no facts upon which the magistrate could reasonably have come to the conclusion that the omission was excusable. When we look at the facts we have already referred to, the period over which the default took place, the scale of the business, and the financial position of the appellant following the period when the books were apparently properly kept, the reasons for the failure to keep proper books seem vague and unsatisfactory. We are satisfied that there were no facts before the resident magistrate upon which he could reasonably have come to the conclusion that this omission was excusable. That means that his decision was erroneous in law and that jurisdiction was conferred on the trial judge to rectify that error.

For these reasons we consider that the High Court judge had jurisdiction to hear the appeal and we consider that the appeal should be dismissed. The case will be remitted to the resident magistrate for conviction and sentence as directed by the High Court.

Case remitted to the Resident Magistrate for conviction and sentence as directed by the High Court.

For the appellant:

A. R. Kapila, Nairobi

Z. Haque

For the respondent:

The Attorney General, Uganda

H. D. Pandya (State Attorney, Uganda)

Lakhamshi Brothers Ltd v R Raja & Sons [1966] 1 EA 313 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	21 September 1966
Case Number:	6/1966(Application For Review)
Before:	Sir Charles Newbold P, Duffus Ag VP and Law JA
Sourced by:	LawAfrica

[1] *Court of Appeal – Jurisdiction – Application to review own judgment tantamount to a request to reverse decision in same case is conceived.*

[2] *Practice – Court of Appeal – Slip rule and power to review compared.*

Editor's Summary

The applicants, who were respondents in the appeal, applied to recall, review and set aside a judgment of the court on grounds which made it quite clear that the review asked for would result in a new judgment contrary to the intention of the court in the original judgment. A preliminary objection was taken on the ground that the court had no jurisdiction to entertain the application.

Held –

- (i) the court had an inherent jurisdiction to recall its judgments in order to give effect to its manifest intention or to what clearly would have been the intention of the court had some matter not been inadvertently omitted, but it would not sit on appeal against its own judgment in the same proceedings;
- (ii) the application should be struck out on the ground that the Court had no jurisdiction to entertain it.

Application struck out.

Cases referred to in judgment:

- (1) *Chemelil Sisal Estate Ltd. v. Makongi Ltd.*, E.A.C.A. Civil Appeal No. 16 of 1965 (unreported).
- (2) *Raniga v. Jivraj*, [1965] E.A. 700 (K.).

Judgment

Sir Charles Newbold P: This is a motion to recall, review and set aside a judgment of this court on grounds which make it quite clear that the review asked for does not seek to substitute a new judgment carrying out the intention of this court when it delivered the original judgment but to substitute a new judgment contrary to that intention. Counsel for the respondents has raised a preliminary objection, submitting that the court has no jurisdiction to entertain this motion; and he referred to a decision of this court in *Chemelil Sisal Estate Ltd. v. Makongi Ltd.* (1) in respect of which, unfortunately, no record of the reasons for the decision exist.

This is the third or fourth application of this nature within the past two years and in my view the time has come to give, beyond any question of doubt, a quietus to motions of this nature. What this motion seeks to do is nothing other than to ask this court to sit on appeal against its own judgment and to do so in the same case in which it gave the judgment. As was said in the *Chemelil* case (1) this court is not prepared to entertain any such jurisdiction. There are certain systems of jurisprudence in which such a course is permitted. These territories, however, derive their basic juridical system from the British system and in the British system there is no power for a court to sit on an appeal against itself in the same proceedings. That juridical system has been adopted as applicable in these territories by the *Chemelil* case (1).

Quite apart from the *Chemelil* case (1) there is also another decision by this court which has been reported, that is the case of *Raniga v. Jivraj* (2), given on an application to remedy a mistake or omission in a judgment of this court. Indeed, there has been a multitude of decisions by this court, on what is known generally as the slip rule, in which the inherent jurisdiction of the court to recall a judgment in order to give effect to its manifest intention has been held to exist. The circumstances, however, of the exercise of any such jurisdiction are very clearly circumscribed. Broadly these circumstances are where the court is asked in the application subsequent to judgment to give effect to the intention of the court when it gave its judgment or to give effect to what clearly would have been the intention of the court had the matter not inadvertently been omitted. I would here refer to the words of this court given in the *Raniga* case (2) [1965] E.A. at p. 703) as follows:

“A court will, of course, only apply the slip rule where it is fully satisfied that it is giving effect to the intention of the court at the time when judgment was given or, in the case of a matter which was overlooked, where it is satisfied, beyond doubt, as to the order which it would have made had the matter been brought to its attention.”

These are the circumstances in which this court will exercise its jurisdiction and recall its judgment, that is, only in order to give effect to its intention or to give effect to what clearly would have been its intention had there not been an omission in relation to the particular matter.

But this application, and the two or three others to which I have referred, go far beyond that. It asks, as I have said, this court in the same proceedings to sit in judgment on its own previous judgment. There

is a principle which is of the very greatest importance in the administration of justice and that principle is this: it is in the interest of all persons that there should be an end to litigation.

This court is now the final Court of Appeal and when this court delivers its judgment, that judgment is, so far as the particular proceedings are concerned, the end of the litigation. It determines in respect of the parties to the particular proceedings their final legal position, subject, as I have said, to the limited application of the slip rule.

I wish to make it quite clear that this court, as has already been said in the *Chemelil* case (1), will not entertain any application of this nature. Any person who in future chooses to make a motion of this nature to the court will have to consider the pains and penalties to which he may be subjected for making an application which has, and which clearly in the opinion of the advocate who brings it, should have, no possible hope of success.

For these reasons, in my view, this application should be struck out on the ground that this court has no jurisdiction to entertain it.

Duffus Ag VP: I entirely agree with the judgment of the learned President.

Law JA: I also agree.

Application struck out.

For the applicants:

Kantilal A. Shah & Co., Nairobi

Satish Gautama and A. B. Shah

For the respondents:

Veljee Devshi & Bakrania

J. M. Nazareth, Q.C., and T. G. Bakrania

Sewa Singh Mandia v Republic [1966] 1 EA 315 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	12 September 1966
Case Number:	113/1966
Before:	Sir Clement de Lestang Ag P, Spry Ag VP and Law JA
Sourced by:	LawAfrica
Appeal from:	The High Court of Kenya – Dalton, J

[1] *Criminal law – Corruption – Intention – Relevance of motive – Magistrate offering bribe to constable as a trap – Prevention of Corruption Act (Cap. 65), s. 3 (2) (K.).*

Editor's Summary

The appellant, who at the material time was a magistrate, was charged and convicted of corruptly giving a bribe to a police constable as an inducement to forebear from taking any proceedings on a number of traffic offences which had allegedly been committed by the driver of the motor vehicle in which the appellant was travelling. The appellant admitted giving the money, his motive being to test the constable as he had "heard of these things and wanted to know if it was real". The trial judge in convicting the appellant adopted the reasoning in *R. v. Smith*, [1960] 2 Q.B. 423 and held that it was not necessary for the prosecution to prove a corrupt motive but merely an intention to corrupt the person to whom the offer was made. On appeal it was argued that the trial judge misdirected himself and the assessors with regard to the word "corruptly" in s. 3 (2) of the Prevention of Corruption Act. For the respondent it was contended that the appellant's motive was immaterial and that all the prosecution had to prove was that the appellant intentionally entered into what was in fact a corrupt transaction.

Held –

- (i) a corrupt motive is an essential ingredient of an offence under s. 3 (2) of the Prevention of Corruption Act;
- (ii) the appellant's state of mind, which included motive and intention, was an essential and material factor in determining whether he was acting corruptly or not: *R. v. Smith*, [1960] 2 Q.B. 423, distinguished;
- (iii) the appellant's motive was innocent.

Appeal allowed.

Cases referred to in judgment:

- (1) *R. v. Smith*, [1960] 2 Q.B. 423; [1960] 1 All E.R. 256.
- (2) *Habib Kara Vesta and others v. R.*, 1 E.A.C.A. 191.
- (3) *R. v. Jetha*, 14 E.A.C.A. 122 (T.).
- (4) *R. v. Hasham Jiwa*, 16 E.A.C.A. 90 (K.).
- (5) *A.-G. v. Shamba Ali Kajembe*, [1958] E.A. 505 (T.).
- (6) *Emperor v. Rama Nana Hagavne* (1922), 46 Bom. 317.
- (7) *Bradrod Election Petition (No. 2)* (1869), 19 L.T. 723.
- (8) *R. v. Carr*, [1957] 1 W.L.R. 165.

Judgment

Law JA, read the following judgment of the court.

The appellant was convicted by the High Court of Kenya (Dalton, J.) of an offence against s. 3 (2) of the Prevention of Corruption Act (Cap. 65) and was sentenced to nine months' imprisonment. On August 30, 1966, we allowed his appeal, quashed the conviction and set aside the sentence, and we now give our reasons.

The particulars of the charge against the appellant were as follows:

"Sewa Singh Mandla on or about the 29th day of January, 1966, at Nairobi in the Nairobi Area corruptly gave the sum of Shs. 15/- to one Joseph Mugero as an inducement to the said Joseph Mugero, being a member of a public body namely a constable in the Kenya Police Force to forbear to take any further action in relation to a traffic offence or traffic offences alleged to have been committed by the driver of a Peugeot motor vehicle, a matter in which the said public body was concerned."

The facts of the case are not in dispute. The appellant, who at the material time was a magistrate at Nyeri, was, on January 29, 1966, a passenger in a motor vehicle driven by one Walia on Thika road near Nairobi, when the vehicle was stopped by constable Joseph Mugero, who was then on traffic duty. The constable inspected the vehicle and told the driver that he was committing various offences, in particular in that the licence had fallen off the windscreen on to the floor of the vehicle, and in that one tyre was allegedly defective. The constable wrote something on a piece of paper which he handed to the driver,

and while so doing acted and spoke in a manner which amounted to soliciting a bribe. The driver said he had no money and drove off, but stopped after a few yards and called the constable whereupon the appellant produced Shs. 15/-, which the constable took. The appellant asked the constable his name and made a note of his number. The constable then tore up the paper which he had previously handed to the driver and went away. Soon afterwards the appellant told the driver, and one Machuria who had been present throughout in the back of the vehicle, that he would accuse the constable when he got back to Nyeri. The appellant in fact returned to Nyeri on January 30, and on February 3, he instructed the court prosecutor, Inspector Tole, to send for constable Joseph forthwith. The constable arrived in Nyeri on the following day, and was taken

to the appellant's chambers. Soon afterwards the appellant sent for Inspector Tole, and in the constable's presence told the Inspector what had happened on the previous Saturday. The constable refunded the Shs. 15/- to the appellant, who then admonished the constable and warned him never to accept bribes again. The constable then returned to Nairobi. Some ten days later, Assistant Commissioner of Police Benjamin Gethi, who was then the officer in charge of police in the Central Province, had occasion to visit the appellant in his chambers to discuss routine matters. In the course of conversation the appellant, voluntarily and without any prompting, informed Mr. Gethi of the events of January 29, and of the action subsequently taken by him in sending for the constable and reprimanding him in the presence of the court prosecutor. The appellant said that so far as he was concerned the matter was closed. Mr. Gethi reported the matter to his superiors in Nairobi, and in due course the proceedings giving rise to this appeal were instituted against the appellant and constable Joseph. In a statement to Senior Superintendent Bell on March 3, the appellant said that he gave the Shs. 15/- to the constable because "I had heard of these things and I wanted to know if it was real".

At the trial, after the close of the prosecution, counsel for the appellant, as he did in this appeal, asked the learned judge for directions as to whether, in the judge's view, it was necessary for the prosecution to prove a corrupt motive, which was, in his submission, an essential ingredient of the offence charged. Counsel for the Republic, relying on the case of *R. v. Smith* (1), submitted that the appellant's motive was immaterial, and that all the prosecution had to prove was that the appellant intentionally entered into what was in fact a corrupt transaction. The learned judge delivered a carefully considered ruling, adopting the reasoning in *Smith's* case (1). The appellant did not give evidence as to his motive, in view of the judge's indication of opinion that such evidence would be irrelevant to the charge. In his judgment convicting the appellant, the learned judge made it clear that he did so because the appellant, whatever his motive, intended that the constable should enter into a corrupt bargain with him.

As the evidence as to the appellant's motive was in effect excluded, this appeal must be decided on the basis that the appellant's motive, in paying Shs. 15/- to constable Joseph, was not a dishonest one, but was directed to the detection and suppression of corruption rather than its encouragement. That this was so is in our opinion borne out by the appellant's conduct, in taking note of the constable's name and number, in announcing his intention to accuse the constable, and in voluntarily disclosing the full facts to Inspector Tole and Assistant Commissioner of Police Benjamin Gethi.

As counsel for the appellant said, in opening his argument on this appeal, the whole question turns on the interpretation of a single word in a penal statute, and that is the word "corruptly" as used in s. 3 of the Prevention of Corruption Act. The subsection relevant to this appeal reads as follows:

"Any person who shall by himself, or by or in conjunction with any other person, corruptly give, promise or offer any gift, loan, fee, reward, consideration or advantage whatever to any person, whether for the benefit of that person or of another person, as an inducement to, or reward for, or otherwise on account of, any member, officer or servant of any public body doing or forbearing to do, or having done or forborne to do, anything in respect of any matter or transaction whatsoever, actual or proposed or likely to take place, in which the said public body is concerned shall be guilty of a felony."

This subsection follows closely the wording of sub-s. (2) of s. 1 of the Public Bodies Corrupt Practices Act, 1889, of the United Kingdom, out of which arose the charge which was the subject of the court's consideration in *R. v. Smith* (1).

The effect of that judgment is that the word “corruptly”, in the context of s. 1 aforesaid, means a deliberate offering of cash or something similar with the intention that it should operate on the mind of the person to whom it is offered to make him enter into a bargain. The motive of the offeror is immaterial. Counsel for the Republic argued that in the great majority of cases motive and intention are the same, and for this reason the words have been used as interchangeable in many of the English and East African cases. The exceptional situation arose in England in *Smith’s* case (1), and has now arisen here in the present case, when the motive was pure but the intention corrupt. He therefore asked us to accept *Smith’s* case (1), and argued that this would not involve departing from previous decisions of this court. Alternatively, he submitted that the word “corruptly” adds nothing to s. 3 of the Prevention of Corruption Act, and that it should not be interpreted as meaning “dishonestly”, but as meaning intentionally doing something prohibited by statute. Counsel for the appellant on the other hand submitted that there is no real distinction between intention and motive, motive being the real or dominant intention, and he invited us to hold that *R. v. Smith* (1) was wrongly decided. We are not prepared to go so far. It was decided on its own peculiar facts and should not be looked at for general principles. The facts in *Smith’s* case (1) are easily distinguishable from those in the present case. For one thing, the offeree in *Smith’s* case (1) was an honest man who Smith thought would accept the bribe, and thus prove his thesis that town councillors as a whole were corrupt. In the instant case, the offeree (the police constable) had shown himself to be already corrupt, and the payment made by the appellant was not made with the intention that it should operate on the mind of the constable to induce him to be corrupt. This being so, the appellant’s state of mind, which in our view includes motive and intention, seems to us to be an essential and material factor in determining whether, in making the payment, he was acting corruptly or not. This has always been the approach adopted by the courts in East Africa, and in our opinion it is the correct approach, in cases in the nature of the one now under consideration. For instance, in *Habib Kara Vesta and Others v. R.* (2), it was held that a genuine police spy is not an accomplice, and therefore does not require corroboration, if his motive is the capture of offenders and not the perpetration of offences. In *R. v. Jetha* (3), in which the appellant was charged with official corruption, Nihill, C.J., said “the essence of the offence is the motive which animates the giver”. In *R. v. Hasham Jiwa* (4), a “trap” case, the decision in *Habib Kara Vesta’s* case (2) was approved and followed. In *A.-G. v. Shamba Ali Kajembe* (5), a court presided over by Sir Kenneth O’Connor, P., held, in a case involving official corruption on the part of the receiver of a bribe, that “corruptly” means that the corrupt purpose or motive must be in the mind of the person charged. The trend of judicial opinion in the courts in India would appear to be to the same effect, see for instance *Emperor v. Rama Nana Hagavne* (6). In that case the accused had been charged with corruptly using false evidence as true, contrary to s. 196 of the Indian Penal Code. In the course of his judgment, Macleod, C.J., said, 321:

“The mere user of false evidence is not sufficient, the user must be corrupt . . . We must give to the word ‘corruptly’ its ordinary dictionary meaning. ‘Corrupt’ is an adjective of very general application. It refers to anything which has been changed so as to become putrid, vitiated, tainted.”

Similarly there is an English case, which does not appear to have been considered by the court in *R. v. Smith* (1). This is the case of *Bradford Election Petition (No. 2)* (7), in which the meaning of the word “corruptly” was considered when used in relation to “treating” as an election offence under the Corrupt Practices Prevention Act (17 and 18 Vic. Cap. 102). Martin, B., said, in the course of his judgment 728:

“Now what is the meaning of that word ‘corruptly’? It is difficult to tell; but I am satisfied that it means a thing done with an evil mind or an evil intention; and except there be an evil mind or an evil intention accompanying the act it is not corruptly done.”

The appellant’s conduct in reporting the matter to two police officers may be an indication that he had no “evil mind” or “evil intention”; see for instance *R. v. Carr* (8) in which Goddard, C.J., said 166:

“Of course, if a person takes a bribe and goes straight off to someone in authority and says ‘here is the bribe he has given me’, that may show he was not acting corruptly.”

It follows that we are of the opinion that the first ground of appeal, that

“The learned judge misdirected himself and the assessors with regard to the meaning of the word ‘corruptly’ in s. 3 (2) of the Prevention of Corruption Act in relation to the charge against the appellant.”

must succeed, in the circumstances of this case. We consider that the motive prompting the giving of a bribe is a relevant consideration in deciding whether or not the bribe was given corruptly.

For these reasons we allowed the appeal.

Appeal allowed.

For the appellant:

A. R. Kapila & Co., Nairobi

E. F. N. Gratiaen, Q.C. (of the English Bar) and *Ramnik R. Shah*

For the respondent:

The Attorney General, Kenya

K. C. Brookes (Deputy Public Prosecutor, Kenya)

Mahendra Raja Jain v Republic [1966] 1 EA 319 (CAD)

Division:	Court of Appeal at Dar-es-Salaam
Date of judgment:	20 August 1966
Case Number:	84/1966
Before:	Sir Clement de Lestang Ag P, Spry Ag VP and Law JA
Sourced by:	LawAfrica
Appeal from:	The High Court of Tanzania – Duff, J.

[1] *Criminal law – Forgery – Accused resident in Dar-es-Salaam carrying on business in partnership with M. resident in England – Accused had stationery printed in Dar-es-Salaam headed with name of M. only and London address – Air-letter purporting to emanate from M. bearing English postage stamps sent to buyer by accused in Dar-es-Salaam – Air-letter contained list of books for sale – No offer to*

purchase made by buyer – Whether air-letter a false document within the meaning of the Penal Code (Cap. 16), s. 335(a)(T.).

[2] Criminal law – Uttering false document – Absence of inducement to act to anyone's detriment – Penal Code (Cap. 16), s. 342 (T.).

Editor's Summary

The appellant was convicted on two counts, one of forgery, contrary to s. 317 of the Penal Code and the other, of uttering a false document, contrary to s. 342 of the Penal Code. The appellant had been living in England before he obtained an appointment as assistant librarian at the University College, Dar-es-Salaam. He had carried on business in partnership with one M. to sell new and secondhand books and he continued his business association with M. after he came to

Dar-es-Salaam. The appellant had some stationery headed with the name M. with a London address and sent a list of books for sale from Dar-es-Salaam on an air-letter to the University College. The air-letter was received by the University College bearing two English postage stamps without post mark or date and was unsigned. The magistrate inferred from the facts before him that the air-letter had not been posted in England but that the appellant had prepared it from stamps removed from some other postal matter, and had arranged for it to reach the Librarian. No offer to purchase the books was made by the University College and it was never suggested that the appellant had, or attempted to have, any influence on the choice of books to be purchased or that the prices asked were other than fair and reasonable. The appellant appealed to the High Court and the main grounds of appeal were, first, that the magistrate had erred in holding that the appellant had affixed the stamps to the air-letter and delivered it to the University College; secondly that he had erred in holding that the air-letter was a false document within the meaning of s. 335 (a) of the Penal Code; thirdly, that he had erred in finding an intent to deceive and fourthly, that he had erred in holding that the document was uttered fraudulently. The High Court dismissed the appeal and on further appeal to the Court of Appeal,

Held –

- (i) as regards an offer or invitation to tender, the identity of the person making the offer or issuing the invitation may or may not be a material particular, but where a prospective purchaser is relying on the skill and integrity of the vendor, the identity of the vendor is most material;
- (ii) the identity of the vendor in this case was material and the air-letter was a document false in a material particular, in that it purported to come from an individual when in fact it came from a firm of which the appellant was a partner; it was prepared with intent to deceive, because it was designed to conceal the appellant's own interest in the business and accordingly all the ingredients of forgery were present and the appellant was rightly convicted on the count alleging that offence;
- (iii) section 342 of the Penal Code only makes the uttering of a false document an offence where it is done knowingly and fraudulently, which meant, in this context, inducing a man to act to his prejudice or detriment, and as there was no evidence whatever that the appellant was seeking to induce the University College to act to its detriment or prejudice, the appellant was wrongly convicted of the offence of uttering a false document.

Conviction on the count of forgery affirmed. Conviction on the count of uttering false document quashed.

Cases referred to in judgment:

- (1) *R. v. Ritson* (1869), L.R. 1 C.C.R. 200.
- (2) *Re London and Globe Finance Corporation Ltd.*, [1903] 1 Ch. 728.
- (3) *Welham v. D.P.P.*, [1960] 1 All E.R. 805.
- (4) *George Woodgate v. R.*, [1959] E.A. 525 (U.).

Judgment

Spry Ag VP, read the following judgment of the court.

The appellant was charged in the District Court of Dar-es-Salaam on seven counts but was acquitted on five. We are only concerned with the two counts on which he was convicted, one of which alleged forgery, contrary to s. 337 of the Penal Code (Cap. 16) and the other, the uttering of a false document, contrary to s. 342 of the Code.

It is necessary to set out briefly the background to the proceedings. The appellant was apparently living in England in 1963, where he formed an association with a lady known as Miss Freya Mulley. The association was both a

personal and a business one. The business side of their relationship was a partnership to sell new and second-hand books. In March, 1964, the appellant came to Tanganyika, having obtained appointment as an assistant librarian or library assistant at the University College of Dar-es-Salaam. At the same time, he maintained his business association with Miss Mulley.

It appears that the appellant hoped to sell books to the University College by which he was employed but wished to do so without his interest being disclosed. He himself somewhat ingenuously said that he “did not think it proper” to sell in his own name. It may be noted that in his petition of appeal to the High Court he explained this, saying that if his colleagues had known of his interest, it might afterwards have been said that this had influenced their decision to buy or as to the price they would pay. That may or may not be the true reason. It appears that he first sold some books through a friend named Shah. He then had some stationery printed in Dar-es-Salaam, headed with the name F. Mulley and an address in London. According to his own evidence, he would type on this headed paper lists of books available for sale and then send them to Miss Mulley to despatch after she had verified that the books were available. This seems a rather tortuous procedure having regard to the fact that most of the books owned by the partnership were in the possession of Miss Mulley, but the appellant explained it by saying that Miss Mulley had no typewriter.

Three of these lists of books, which may be regarded as invitations to treat, were sent to the University College. In response to the first, an offer to purchase certain books resulted and they were supplied and paid for. Both the offer to purchase and the cheque in payment were sent to “F. Mulley” in London and were received by Miss Mulley. The books were actually delivered to the University College by the appellant. No offer to purchase was made by the University College following either the second or the third list of books.

It was never suggested that the appellant had, or attempted to have, any influence on the choice of books to be purchased by the University College or that the prices asked were other than fair and reasonable.

The charges with which we are concerned arose out of either the second or the third of the lists of books sent to the University College. This was typed on an air-letter form which, when it was received by the University College bore two English postage stamps. It was undated and unsigned. It bore no postmark. The stamps bore a postal cancellation consisting of parallel wavy lines. There was expert evidence, and indeed it is quite apparent, first, that the cancelling lines on the two stamps do not coincide and, secondly, that although the bottom of the stamps appear to cut through the lowest of the wavy lines, the balance of those lines does not appear on the air-letter form. It may be added that although the cancelling lines reach the edges of both stamps on either side, there is no overlap onto the air-letter form.

The learned trial magistrate inferred from these facts that the air-letter had not been posted in England but that the appellant, having prepared it, as he himself admitted, had affixed the two stamps, which had been removed from some other postal matter, and had arranged for the air-letter to reach the Librarian of the University College. The learned magistrate went on to say that the air-letter “purported to be an offer of sale of certain books from F. Mulley of an address in England. In fact, it had never been sent by F. Mulley, and consequently it was a document which purported to be in fact what it was not”. He accordingly found the appellant guilty of forgery and uttering a forged document.

The appellant appealed to the High Court. His main grounds of appeal were, first, that the learned magistrate had erred in holding that the appellant had affixed the stamps to the air-letter and delivered it

to the University College; secondly, that he had erred in holding that the air-letter was a false document

within the meaning of s. 335 (a) of the Penal Code; thirdly, that he had erred in finding an intent to deceive; and, fourthly, that he had erred in holding that the document was uttered fraudulently. It is unnecessary to set out the arguments advanced in the High Court in support of those propositions, as they were substantially similar to those advanced in this court. They were rejected by the learned appellate judge.

In this court, counsel for the appellant, began by submitting that the learned magistrate had erred in drawing from the primary facts the inference that it was the appellant who had affixed the stamps to the air-letter and delivered it to the University College. He submitted that the learned magistrate had failed to consider other possible explanations of the facts. It might be that Miss Mulley had herself affixed the stamps, or someone to whom she had given the air-letter for posting. Alternatively, Shah, who on his own admission had misappropriated one of the appellant's letters, might have misappropriated another with which Miss Mulley was returning the air-letter to the appellant, might have affixed the stamps to the air-letter and posted it.

We accept that a conviction may only be based on circumstantial evidence if it points irresistibly to the guilt of the accused and is incapable of any other reasonable explanation. We do not, however, propose to examine the question whether the alternative explanations put forward by counsel for the appellant cast a doubt on the finding of the learned magistrate because in our view, for reasons which will appear, the conviction of forgery can be sustained on other grounds, while the conviction of uttering must be quashed, also on other grounds.

The second ground of appeal was that the air-letter was not a false document within the meaning of s. 335 of the Penal Code. The relevant part of that section is as follows:

“335. Any person makes a false document who
(a) makes a document purporting to be what in fact it is not;”

Counsel for the appellant submitted that the air-letter, far from purporting to be what it was not, both purported to be and was a letter setting out a list of books which Miss Mulley had for sale and for which she was inviting offers. The evidence before the court, such as it was, indicated that Miss Mulley was a real, not a fictitious, person and that the appellant had her authority to act on her behalf. At the lowest, there was no evidence that the appellant lacked such authority. The failure of the prosecution to call Miss Mulley after indicating that she would be called, for which no explanation was offered, raised a presumption that her evidence would be favourable to the appellant.

These arguments would, we think, be valid if the appellant had been acting merely as agent for Miss Mulley, but in his evidence the appellant said “I was in partnership with F. Mulley”. In the light of this statement, the air-letter is not what it purports to be. It purports to be an invitation to treat issued by a person named F. Mulley; it was in fact an invitation to treat issued by the firm of F. Mulley and M. R. Jain. Counsel for the appellant submitted that there was no evidence to show that this transaction was on the partnership account or that the appellant stood to gain by it. With respect, we cannot agree. The appellant gave evidence of the partnership and never suggested that he ever acted as agent for Miss Mulley outside the partnership. On the evidence, there can be no possible doubt that this was a partnership transaction.

It has been accepted law in England, at least since *R. v. Ritson* (1), that for a document to be false so as to establish forgery, the falsity must be in some material particular. Having regard to the provisions of s. 4 of the Penal Code,

which directs that the expressions used in the Code are to be construed in accordance with English criminal law, it is clear that the word “false” in s. 333 must be read as false in some material particular.

It appears to us that as regards an offer or an invitation to tender, the identity of the person making the offer or issuing the invitation may or may not be a material particular. Where a prospective purchaser is relying on the skill and integrity of the vendor, the identity of the vendor is obviously most material; on the other hand, a person buying a standard article at a fixed price will probably be indifferent to the identity of the person with whom he is dealing. In case of doubt, the onus of showing that the particular is material is, of course, on the prosecution. In the present case, the list of books is headed “*Offers of some out-of-print and rare law books*”. We think that is enough to put the transaction into the category where the prospective purchaser is, or is likely to be, concerned with the identity of the vendor.

We think also that where there is an intent to defraud or deceive, and for reasons which will appear later we think there was an intent to deceive in the present case, any false particular inserted for the very purpose of achieving the fraud or deceit cannot be immaterial. The falsity of the document is a matter of fact, but the materiality of the falsity is, or at least may be, inextricably related to the intent with which the document is made or uttered.

We think, therefore, though for a somewhat different reason from that given by the learned magistrate, that the air-letter was a document false in a material particular and we think the falsity is within the terms of the charge.

The third ground of appeal was that no intention to deceive had been proved and as no intent to defraud was alleged, the offence of forgery was not established. The arguments advanced in favour of this ground were substantially the same as those for saying that the air-letter was not a false document.

To deceive was defined by Buckley, J., in *Re London and Globe Finance Corporation Ltd.* (2) as

“to induce a man to believe that a thing is true which is false, and which the person practising the deceit knows or believes to be false.”

This was amplified by Lord Radcliffe in *Welham v. D.P.P.* (3) when he said that:

“deceit can involve a reckless indifference to truth or falsity as well as the deliberate making of false statements; and in all cases it may involve the inducing of a man to believe a thing to be false which is true as well as to believe to be true what is false.”

The essence of deceit is the inducing of a state of mind.

In the present case, it is abundantly clear, if only from the appellant’s evidence, that he was anxious, for whatever reason, to conceal from the University College authorities that the offers of books were coming from a firm in which he was a partner: he wished those authorities to believe that the offers were coming from an individual in England. That was intent to deceive.

The appellant, on his own evidence, prepared the air-letter; that was a false document in a material particular, in that it purported to come from an individual when in fact it came from a firm of which he was a partner; it was prepared with intent to deceive, because it was designed to conceal his own interest in the business. All the ingredients of forgery were present, and we think the appellant was rightly convicted on the count alleging that offence.

The position regarding the other count, the fourth ground of appeal, is very different. Section 342 of the Penal Code only makes the uttering of a forged

document an offence where it is done knowingly and fraudulently. The meaning of the expression “to defraud” was considered by this court in *George Woodgate v. R.* (4). It was considered again in *Welham v. D.P.P.* (3). It is sufficient for the purposes of this judgment to say that it means inducing a man to act to his prejudice or detriment.

In the present case, there was no evidence whatever that the appellant was seeking to induce the University College authorities to act to their detriment or prejudice. This appears to have been overlooked in both the lower courts, where the conviction of uttering seems to have been treated as following automatically on the conviction of forgery.

We would add that in the circumstances of the present case, the offence committed by the appellant was not one of great gravity, indeed it would appear that it would not have constituted an offence under English law, the law of Tanganyika being more strict in this respect. We think therefore that the probation order passed by the learned magistrate was proper and fitting.

The conviction on the count of uttering a forged document, that was the seventh count on the charge sheet, is quashed and the appeal is allowed to that extent. The conviction of forgery, that was the sixth count on the charge sheet, and the probation order will stand and the appeal, so far as it is against them, is dismissed.

Conviction on the count of forgery affirmed. Conviction on the count of uttering false document quashed.

For the appellant:

Sayani, Balsara & Velji, Dar-es-Salaam

N. A. Velji

For the respondent:

The Attorney General, Tanzania

R. H. Kisanga (State Attorney, Tanzania)

Uganda v Sisto Angalifo Welli

[1966] 1 EA 324 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	30 August 1966
Case Number:	341/1966
Before:	Sir Udo Udoma CJ
Sourced by:	LawAfrica

[1] *Criminal law – Jurisdiction – Trial by magistrate grade II – Punishment for offences exceeding trial magistrate’s jurisdiction – Election by accused person to be tried summarily – Whether magistrate has jurisdiction to try accused – Magistrates’ Court Act, 1964, ss. 10 (4), 10 (5) and 18 (U.).*

[2] Criminal law – Revision – Trial by magistrate – Whether inadequacy of sentence a ground for review – Criminal Procedure Code, s. 340 (2) (U.).

[3] Criminal law – Practice – Revision – Reporting magistrate to act speedily and with sufficient remarks – Criminal Procedure Code, s. 340 (2) (U.).

Editor's Summary

The accused was charged before a magistrate grade II with offences against the Game (Preservation & Control) Act, 1962, on three counts, namely, (i) hunting an elephant on an expired supplementary licence under s. 50 (a), (ii) being illegally in possession of ivory under s. 22 (1), (2) and (4), and (iii) failing to keep an accurate record of animals killed under s. 84. He pleaded guilty and was convicted and sentenced to Shs. 150/- or four months' imprisonment on the first count, on the second count the trophies were forfeited and on the third count his licence was cancelled. The jurisdiction of the trial magistrate was limited and it was common ground that the punishment prescribed for the offences far

exceeded his jurisdiction. Before entering upon the trial the magistrate gave the accused the option of summary trial under s. 18 of the Magistrate's Court Act, 1964, and the accused freely submitted to the jurisdiction of the court. The acting chief magistrate then applied to the High Court under s. 340 (2) of the Criminal Procedure Code for an order in revision setting aside the convictions and sentences on the grounds that the maximum penalty prescribed under the Act exceeded the jurisdiction of the trial magistrate and that the penalty imposed was so inadequate as to amount to a miscarriage of justice. The court of its own motion also took up the question whether the first count disclosed an offence.

Held –

- (i) compliance with s. 18 of the Magistrate's Court Act 1964 and the election of accused person for summary trial conferred the necessary jurisdiction on the trial magistrate;
- (ii) when forwarding the record of an inferior magistrates' court for revision under s. 340 (2) of the Criminal Procedure Code the reporting magistrate must act speedily, particularly when the sentences imposed are short, he must also make sufficient remarks to enable the revising court to see the substance of any objections at a glance;
- (iii) questions as to the adequacy of sentence were within the inferior magistrate's discretion and could not be dealt with on review under s. 340 (2) of the Criminal Procedure Code unless that discretion had been exercised injudicially;
- (iv) Section 50 (a) of the Game (Preservation and Control) Act, 1959, created no offence and the first count was bad in law; the plea of guilty was therefore null and void.

Conviction and sentence on first count set aside and those on the second and third counts confirmed.

No cases referred to in judgment

Neither party appeared. Revisional order made in chambers.

Judgment

Sir Udo Udoma CJ: There are two grounds upon which the Acting Chief Magistrate Gulu has applied to this court for an order in revision setting aside the conviction and sentence in this case. The grounds are:

- “(1) That the conviction is bad in law as the maximum penalty under s. 90 of the Game (Preservation and Control) Ordinance 1959 is outside the jurisdiction of the Grade II Magistrate who heard the case; and
- (2) That the penalty imposed is so inadequate as to amount to a miscarriage of justice.”

The Director of Public Prosecutions has opposed the application, except as to sentence, on the ground that the magistrate had duly complied with the requirements of the provisions of s. 10 (4), (5) and s. 18 of the Magistrates' Court Act 1964, and therefore was competent and had full jurisdiction to have tried the accused.

The Acting Chief Magistrate has not disclosed or indicated in any way the maximum penalty prescribed by s. 90 of the Game (Preservation and Control) Act in support of the assertion that the Magistrate Grade II had no jurisdiction to have tried the accused; nor has the magistrate indicated the limits of the jurisdiction of a magistrate grade II which had been exceeded and the law prescribing such

jurisdiction.

I think in matters of this sort, in which objection is taken to the exercise of jurisdiction by a court, a mere assertion that the court has no jurisdiction is not enough. Indeed, it is of no assistance to this court, and does not lend itself to the expeditious hearing and disposal of the application for a revision. Further, I

may point out, speed is an indispensable requisite in a case like this where the term of imprisonment is of short duration.

Under s. 340 (2) of the Criminal Procedure Code, a magistrate is only empowered to forward to this court the proceedings of an inferior court where he considers that any finding, sentence or order of such an inferior court is:

- (a) illegal; or
- (b) improper; or
- (c) that the proceedings are irregular,

and where any of those circumstances is satisfied, the magistrate shall forward such record of proceedings to this Court with such remarks thereto as he thinks fit.

Although the remarks to be made are stipulated to be in the discretion of the magistrate, I think it is necessary that such remarks should be of assistance to this court so as to enable the court at a glance to see the substance of the complaint, especially as such remarks are not expected to be supplemented or enlarged upon by oral argument.

It is to be hoped that magistrates would in future always endeavour to give full particulars of their complaints or objections or remarks, when forwarding records of inferior courts for revision.

The charge against the accused comprises three counts as follows:

- (1) Hunting an elephant on an expired supplementary licence contrary to s. 50 (a) (Act No. 11/62) of the Game (Preservation and Control) Ordinance;
- (2) Being illegally in possession of ivory contrary to s. 22 (1), (3) and (4) of the Game (Preservation and Control) Ordinance (amended by Act No. 11) of 1962); and
- (3) Failing to keep an accurate record of animals killed contrary to s. 84 of the Game (Preservation and Control) Ordinance (Act No. 11 of 1962).

At the trial, on being informed of his rights in terms of the provisions of s. 18 of the Magistrates' Court Act, 1964, the accused, in exercise of his said rights, elected to be tried by the magistrate grade II and thereafter pleaded guilty to all the three counts of the charge. He was found guilty, convicted and sentenced to Shs. 150/- or four months' imprisonment on the first count. On the second count, the trophies (i.e. ivory) were forfeited and ordered to be sold and the sum realised from such sale to be paid into revenue; and in respect to the third count, the accused's licence was cancelled.

The first ground of objection is as to the jurisdiction of the magistrate grade II. The punishment prescribed under s. 90 of the Game (Preservation and Control) Act, relied upon by the Acting Chief Magistrate, is a fine not exceeding Shs. 4,000/- or imprisonment for a period not exceeding two years. The punishment under s. 90 of the Act can only apply in the context of the charge, in this case to the third count, which was laid under s. 84 of the Act.

The punishment provided in s. 22 (1), (3), (4) of the Act for the offence therein created, is imprisonment for a term not exceeding twelve months, or a fine not exceeding Shs. 8,000/-. For the present, I do not propose to deal with the first count of the charge, but shall revert to it later.

The limits of the jurisdiction of the magistrate grade II under s. 10 and the first schedule to the Magistrates' Court Act, 1964, at all times material to the trial and conviction of the accused, was a fine not exceeding Shs. 1,000/-, or imprisonment not exceeding one year, and six strokes of the cane,

wherever appropriate.

From this it follows, I think, that the magistrate had no jurisdiction as of right to have tried the accused in respect to the second and third counts of the charge,

since, for instance, the fine stipulated in s. 22 of the Act, under which the second count was laid, is Shs. 8,000/-.

That being so, in order to be vested with jurisdiction, it was the duty of the magistrate to avert to the provisions of s. 18 of the Matristrates' Court Act, 1964, and to comply therewith; and that was precisely what the magistrate did in this case, as a result of which the accused exercised his right of election thereby conferring on the magistrate grade II the jurisdiction to be tried by him. Thus, the accused freely submitted to the jurisdiction of the court.

From the foregoing, there can be no doubt whatsoever that, by consent of the accused, the magistrate was competent to try the accused. I therefore agree with the submission of the Director of Public Prosecutions that the magistrate had jurisdiction to have tried the accused and that the objection by the acting chief magistrate is ill founded. It has no substance in law, and must be and is accordingly rejected.

Then it was said that the penalty imposed on the accused by the magistrate grade II, is so inadequate as to amount to a miscarriage of justice. Here again, the acting chief magistrate has not referred this court to the authority for the proposition implied in this objection; namely that it is the duty of chief magistrates to prowl into the record of proceedings maintained by magistrates grade II, for the purpose of seeing to it that sentences passed by such magistrates on conviction of accused persons are adequate; or must not be so inadequate as to amount to a miscarriage of justice.

The jurisdiction exercised by magistrates is vested in them by law. It is therefore incompetent for a magistrate to assume jurisdiction where such jurisdiction is not conferred upon him, for magistrates of whatever grade are creatures of statutes and their jurisdiction is very much circumscribed and restricted by law. As indicated above, a magistrate can only forward the record of an inferior court for revision to this court in three circumstances, namely where he considers that the findings, sentence or order of such an inferior court are:

- (a) illegal; or
- (b) improper; or
- (c) that the proceedings are irregular.

The complaint by the acting chief magistrate as to the inadequacy of the sentence imposed upon the accused by the magistrate grade II does not, in my view, fall within any of the three categories set out above. The complaint is not that the sentence is illegal or improper, or that the proceedings are irregular.

Questions of sentence are matters entirely within the discretion of a magistrate, or of any court; and the only proper ground upon which this court can interfere in the award of a sentence is where it is satisfied that that discretion has not been judicially exercised. No such allegation has been made in this application; nor, if made, could it have been substantiated.

In my opinion, this application must be refused, as I am satisfied that the acting chief magistrate had no authority in law, or jurisdiction to have forwarded the record of proceedings in this case to this court, merely on the ground that the sentence imposed by the magistrate grade II was inadequate.

However, before disposing of this matter, there is a point of law to which no reference was made by the acting chief magistrate in his application for revision in this case. The point is one of great importance and cannot be ignored by me since the proceedings have been brought to my notice. The point relates to the question whether the charge as laid in the first count did disclose any offence.

The accused was charged, as already observed, on the first count with hunting an elephant on an expired supplementary licence, contrary to s. 50 (*a*) of the Game (Preservation and Control) Act, the provisions of which are:

“50. Every supplementary licence shall:

- (a) expire on the same date as the basic licence in respect of which it has been issued; and
- (b) be valid only for the federal state, or district in which it was issued.”

It is plain, therefore, that s. 50(a) (and there are only two subsections in the section), does not create any offence at all. It is concerned only with the duration and validity of supplementary licences. It is clear therefore, in my view, that the first count of the charge laid under s. 50(a) of the Game (Preservation and Control) Act, was bad in law, as it does not disclose any offence at all; and therefore, even though the accused had pleaded guilty thereto, such plea was null and void and unavailing as it did not relate to any particular offence.

The magistrate grade II was wrong in law to have accepted the plea, and thereafter to have convicted the accused on the first count. The conviction of and the sentence imposed on the accused were illegal, and must be and are accordingly set aside. It is further ordered that if the fine had been paid, the same be forthwith refunded to the accused. Order accordingly.

Conviction and sentence on first count set aside and those on the second and the third counts confirmed.

Eneriko Lutalo and another v Uganda [1966] 1 EA 328 (HCU)

Division: High Court of Uganda at Kampala
Date of judgment: 5 September 1966
Case Number: 86-87/1966
Before: Sir Udo Udoma CJ
Sourced by: LawAfrica

[1] Criminal law – Sentence – Ambiguity – Two accused convicted jointly on two counts of robbery with violence – Sentence passed “Five years each imprisonment and fourteen strokes with an approved instrument on each count” – Whether sentence passed bad in law.

Editor’s Summary

The two appellants were charged jointly on two counts of robbery with violence and were found guilty and convicted. They were sentenced to “five years each – imprisonment and fourteen strokes with an approved instrument each count”. The incidents in respect of which they were charged took place at the same time but as two persons were attacked two separate counts were brought. Both appellants appealed against their conviction and sentence. Their appeals against conviction were without merit and were dismissed. As to sentence, counsel for the respondent submitted that it was ambiguous and bad in law and the case should be remitted for re-sentencing.

Held –

- (i) the sentence was neither bad ab initio nor incurable but it was ambiguous and the High Court had ample power to clarify it on looking at the proceedings to ascertain the magistrate's intention;

- (ii) the most favourable construction failed to show whether the two appellants should undergo consecutive or concurrent sentences on each count;
- (iii) lest a sentence on a charge comprising more than one count be bad in law or unenforceable the court must specify whether it is to be concurrent or consecutive;
- (iv) there was an irresistible inference that the magistrate intended to impose concurrent sentences on each count since each count was substantiated and each would have supported a sentence of five years with fourteen strokes.

Re Hastings (1958), 42 Cr. App. Rep. 132, applied.

Appeal dismissed.

Case referred to in judgment:

- (1) *Re Hastings* (1958), 42 Cr. App. Rep. 132.

Judgment

Sir Udo Udoma CJ: The two appellants were charged jointly with two counts of robbery with violence, contrary to s. 272 and punishable under s. 273 of the Penal Code. They were tried together, found guilty and convicted by the Resident Magistrate in the District Court, Mengo. They were sentenced to “five years each – imprisonment”. They both now appeal against their conviction and sentence.

The appeal against conviction is dismissed as without merit. The only issue for decision on the evidence was as to the identity of the assailants of Florence Nalongo and Efulansi Babirye, which was purely an issue of fact. On that issue the learned trial magistrate properly directed himself and, in my view, came to a correct conclusion when he said:

“On the evidence before me I am satisfied that the two accused were positively identified as being members of that gang that robbed the complainant and her daughter of all their property . . . I am satisfied that the evidence is sufficiently corroborated and identification is complete.”

On the appeal as to sentence, I must confess that the order made by the learned trial magistrate imposing sentence on the appellants is not without some difficulty to understand. The question seems to me to be one of law and is as to whether or not the sentence passed by the learned trial magistrate was bad in law.

In passing sentence, the learned trial magistrate had said:

“Sentence: five years each – imprisonment and fourteen strokes with an approved instrument each count.”

Counsel for the state submitted that the sentence was bad in law and should be set aside by the court and the case sent back with an order that the learned trial magistrate do pass correct sentences on the appellants. Counsel’s contention was that it was difficult to know from the notes in the record of proceedings what the trial magistrate really meant by his order.

While I am inclined to agree that the sentence passed by the learned trial magistrate, according to his notes, appears bad in law because it is ambiguous and might be difficult of enforcement, it must be observed that the order is not incurably bad; and it would be incorrect to treat it as bad ab initio. It is doubtful whether it would be competent for this court to remit the case back to the learned trial magistrate for a correct sentence, having regard to the wide powers vested in and exercisable by this

court on appeal as contained in the Criminal Procedure Code, even if the court was of the opinion that the sentence was bad in law.

I think I am right in stating that in the circumstances of the instant case where the appellants had been properly tried and convicted on legal evidence, if the court should come to the conclusion that the sentence is bad in law, it would be competent for this court to pass a proper sentence according to law.

The problem raised by the order of the magistrate in the first place is that it is difficult to know whether the words “each count” in the last line of the order refers to and includes “five years each – imprisonment”, or is only restricted to “fourteen strokes with an approved instrument”. In the second place the matter is complicated by the fact that two accused persons are involved in the sentence.

There is no doubt, however, that the word “and” between “imprisonment” and “fourteen strokes” is conjunctive. Nevertheless, it would have been easier to ascertain the intention of the trial magistrate if his order had read:

“Sentence: Each accused five years’ imprisonment and fourteen strokes with an approved instrument each count” or

“Sentence: five years’ imprisonment each accused and fourteen strokes with an approved instrument each count.”

Unfortunately, that is not the position and the court must interpret the order as it finds it.

The question as to whether or not the sentence passed on the appellants is legal is, in my view, a question simply of construction. As the order “Sentence: five years each – imprisonment and fourteen strokes with an approved instrument each count” is susceptible of a number of meanings, it seems to me that to ascertain the true meaning of the order the first matter for consideration and ascertainment must be the intention of the trial magistrate as could be gathered from the proceedings at the time of passing the sentence.

The question then is, what did the learned trial magistrate mean by the order made by him having regard to the fact that the sentence was passed on two accused persons, who were jointly charged, tried and convicted on two separate counts of a charge, both of which were of robbery with violence, of two separately named persons?

Although the order is capable of a number of meanings, in an attempt to make sense of it, it is the duty of this court to give the best possible construction to the order. In which case I think it is necessary to confine the meaning of the order to two possible constructions, namely, that the order fully expanded into a sentence may mean either:

- (1) Sentence: I sentence each of the accused persons to five years’ imprisonment and fourteen strokes with an approved instrument on each of the counts of the charge; which analytically and graphically interpreted means:

I sentence first accused on first count to five years’ imprisonment and fourteen strokes with an approved instrument, and on the second count to five years’ imprisonment and fourteen strokes with an approved instrument; and the second accused on the first count to five years’ imprisonment and fourteen strokes with an approved instrument, and on the second count to five years’ imprisonment and fourteen strokes with an approved instrument; or

- (2) I sentence each of the accused persons on the two counts of the charge to a total of five years’ imprisonment and fourteen strokes with an approved instrument, which must be acknowledged to convey an entirely different meaning from the first sentence.

Even when given the most favourable construction the order appears defective because as it stands it is

not clear whether the sentences were intended to be concurrent or consecutive. For the purpose of ascertaining that fact, it becomes

necessary to look at the circumstances surrounding the incident, the subject matter of the charge.

On the evidence, the robbery took place in the house of Florence Nalongo into which the two appellants with others unknown had broken. On gaining access to the house, the two appellants, together with others unknown, attacked Florence Nalongo and her daughter Efulansi Babirye and stole property belonging to both Florence Nalongo and Efulansi Babirye. Hence, the separate counts, although the incident took place at the same time.

As there appears to be no reported East African case on the problem raised in this order as to sentence, I think I am right in stating that it is an accepted practice, indeed almost a rule of law, that when sentence is passed on a charge comprising more than one count, it is the duty of the court to indicate clearly whether sentence is to be concurrent or consecutive. Failure to do so might result in the order for sentence being set aside as bad in law or illegal and unenforceable.

There are English authorities for the proposition that where a prisoner is convicted on several counts of a charge, and it is the intention of the court that there should be concurrent sentences on each count, it is always desirable that the court should use the word “concurrent” or “on each count” or other words which make it clear to the prisoner that concurrent sentences are being passed.

In the case under consideration, while it is true that the order made by the magistrate as to sentence the word used is “on each count” yet, as already indicated, the problem posed is that two accused persons are concerned in the matter.

The clearest authority for the proposition I have been able to lay hand on is *Re Hastings* (1). There an applicant for a writ of Habeas Corpus was tried at the Liverpool Crown Court before the learned Recorder of Liverpool on an indictment containing five counts. The first count was a count for larceny (as bailee). The second, third and fourth counts were for obtaining money by false pretences and the fifth was a count for fraudulent conversion.

The jury found the applicant guilty on all counts and the learned Recorder sentenced him to four years’ corrective training in these words:

“You have been convicted on the plainest evidence of deliberate, calculated and systematic frauds. Those frauds have not only affected companies well able to sustain loss, but have cruelly brought grave financial burdens on little men, which will be difficult for them to bear. This is by no means the first time you have been convicted of dishonesty. You are a menace to the integrity and health of the commercial community. You will go to prison for four years’ corrective training.”

On appeal against conviction only, the Court of Criminal Appeal quashed the conviction on the first count of the indictment, but dismissed the appeal in other respects in these words:

“The conviction on the first count is quashed, in other respects the appeal fails, and there will be no alteration of sentence.”

Thereafter, counsel for the applicant moved in the matter for a writ of habeas corpus to bring up the body of the applicant “at present detained in Liverpool Gaol where he is serving a sentence of four years’ corrective training with a view to his being discharged on the ground that his detention is illegal”.

At the hearing of the application, the main contention of counsel for the applicant was that there was no legal sentence ever passed upon the applicant by the court because the sentence of four years’ corrective training, having been duly endorsed on the indictment and the endorsement not having shown four years’

corrective training on each of the counts, and the learned Recorder not having used the word “concurrent on each count”, and the Court of Criminal Appeal having subsequently quashed the conviction on the first count, and since the sentence was passed upon an indictment containing five counts, one of which had been quashed, there was nothing to show to which count the sentence was applicable. Finally, counsel had submitted that no sentence was passed on any count at all and that therefore there was no legal sentence authorising the detention of the applicant in gaol.

These submissions were rejected, and it was held by the Divisional Court that, since in passing sentence the learned Recorder had said: “You have been convicted . . . of deliberate, calculated and systematic frauds”, categorised the persons who had been victimized by the frauds and finally said: “you will go to prison for four years’ corrective training”, it was clearly the intention of the learned Recorder to pass concurrent sentences in respect of each count and, though the conviction on the first count was subsequently quashed, the prisoner was undergoing a lawful sentence in respect of the other counts with which the Divisional Court could not interfere on a motion for habeas corpus.

This case established the principle that:

“Where a prisoner is convicted on several counts on an indictment and it is the intention of the judge that there shall be concurrent sentences on each count, it is always desirable that a judge should use the word “concurrent” or “on each count” or other words which make it clear to the prisoner that concurrent sentences are being passed. Provided that the Court of Criminal Appeal can clearly see what was the intention of the judge in passing sentence; the question of the exact words used is immaterial.”

Applying the above principle to the circumstances of the instant case, I am of opinion that the irresistible inference that can be drawn from the facts and circumstances of this case must be that the learned trial magistrate had intended by this order that there should be a sentence concurrent on each count against each of the appellants.

That being so, I must hold that by his order the learned trial magistrate had intended to sentence each of the two appellants to five years’ imprisonment and fourteen strokes with an approved instrument as concurrent sentences on the two counts of the charge, since the said two counts were not alternative, but separate and distinct offences either of which would support a sentence of five years’ imprisonment and fourteen strokes of the cane. The use of the words “each count” in the order by the learned trial magistrate is of great significance, and must be given full weight on the assumption that it could not have been used in vain.

In any case, had this court entertained any doubt as to the intention of the learned trial magistrate in passing sentence, or had the court been satisfied that the sentences imposed upon the appellants were incurably bad, the court would have conceived it its duty to exercise its powers under s. 331 and s. 331b of the Criminal Procedure Code and have the sentences set aside and substituted therefore appropriate sentences according to law, since the court is satisfied that no substantial miscarriage of justice has actually occurred.

As indicated above, although the order of the learned trial magistrate did appear to create some difficulties at first sight, I think it is very clear from the analysis of the evidence that the intention of the learned trial magistrate was to pass a sentence of five years and fourteen strokes against each of the two appellants on each of the two counts, such sentences to run concurrently.

This appeal is therefore dismissed. The sentences of five years’ imprisonment and fourteen strokes on each of the appellants concurrent on each of the two counts of the charge are confirmed. In other words,

the first appellant to go to

prison for five years and to receive fourteen strokes of the cane on the first count and also on the second count to go to prison for five years and to receive fourteen strokes of the cane. Similarly, the second appellant to go to prison for five years and to receive fourteen strokes of the cane on the first count and on the second count also to go to prison for five years and to receive fourteen strokes of the cane. All sentences to run concurrently. Sentences to date from the date of conviction.

Appeal dismissed.

The appellants did not appear and were not represented.

For the respondent:

The Attorney General, Uganda

A. W. F. Kakembo (State Attorney, Uganda)

Nterekeiya Bus Service v Republic [1966] 1 EA 333 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	14 July 1966
Case Number:	527/1966
Before:	Sir John Ainley CJ and Miller J
Sourced by:	LawAfrica

[1] *Criminal law – Practice – Charge against unincorporated body – Plea of guilty by unidentified person – Conviction of unincorporated body and imposition of fine – Whether conviction a nullity – Traffic Act (Cap. 403), s. 55 (1) (K.) – Penal Code (Cap. 63), s. 23 (K.) – Interpretation and General Clauses Act, s. 2 (K.).*

[2] *Unincorporated body – Criminal liability – Whether a firm or unincorporated society can be charged, convicted and punished in the name adopted by the firm or society – Traffic Act, s. 55 (1) (K.) – Penal Code, s. 23 (K.) – Interpretation and General Clauses Act, s. 2 (K.).*

Editor's Summary

The appellant had been charged under s. 55 (1) of the Traffic Act and convicted of the offence of permitting one Charles Rimui to use a motor vehicle in an unroadworthy condition. At the trial the magistrate recorded the presence of “the accused” and it appeared that some person whose name was not known and who was not charged paid the fine. The true nature of the appellant was not known but it was certainly not an incorporated body and the question on appeal to the High Court was whether on the facts a conviction of something called the Nterekeiya Bus Service could stand.

Held –

- (i) it was perfectly plain that a firm or body unincorporate could not be charged, convicted and punished solely in the name adopted by the firm or society. *R. v. Nurmohamed Jessa and Others*, 12 E.A.C.A. 106, distinguished;
- (ii) the conviction was a nullity.

Appeal allowed. Conviction and sentence set aside.

Cases referred to in judgment:

- (1) *Davey v. Shawcroft*, [1948] 1 All E.R. 827 at p. 828.
- (2) *Sadler v. Whiteman*, [1910] 1 K.B. 889.
- (3) *Wurzel v. Houghton Main Home Delivery Service Ltd. and Wurzel v. James Atkinson, Walter Norfolk and James Ward*, [1937] 1 K.B. 380.
- (4) *R. v. Hirabhai Pushotam Patel and Naranbhai Somabhai Patel* (1944), 21 K.L.R. 86.
- (5) *Stephen Obiro v. R.*, [1962] E.A. 61 (K.).
- (6) *R. v. Nurmohamed Jessa and Others*, 12 E.A.C.A. 106.

Judgment

Sir John Ainley CJ, read the following judgment of the court.

In this case a concern known as the Nterekeiya Bus Service was charged with permitting one Charles Rimui to use a motor vehicle which was not maintained in a roadworthy condition contrary to s. 55 (1) of the Traffic Act, and was convicted and fined.

It has been pointed out that the section involved speaks simply of using vehicles, not of permitting the use of motor vehicles. The charge was perhaps carelessly drafted, but we think that since an employer who permits his driver to use a motor vehicle on his (the employer's) business himself uses that vehicle, this matter was not fatal to the conviction.

The question remains whether the Nterekeiya Bus Service was an entity which could be charged, convicted and fined. Now whatever this Bus Service may be it is not a corporation. "Nterekeiya Bus Service" may be the name under which a single individual carries on a passenger transport service, or it may be the name adopted by a partnership firm or by an unincorporated society of some kind, but it is not an incorporated body. If we are to believe the information given in the charge sheet this Bus Service was arrested without warrant. The magistrate recorded the presence of "the accused". Someone is recorded as having said, "It is true" in answer to the charge, and this person is fairly clearly the employer, or one of the employers, of Charles Rimui who drove the motor vehicle when it was in an unsatisfactory condition. It is probably this person on whom the magistrate's mind rested when he convicted, and it is this someone who is probably the true appellant. We do not think that the true appellant is likely to be a very meritorious person. If he sent his driver out with a motor vehicle suffering from the defects alleged here he was endangering his driver's life and the lives of many other people besides. He deserved a heavy fine.

However, this person, whose name we do not know, was not charged, and though he probably paid the fine it cannot be said that he was convicted.

The question, we repeat, is whether what on the face of the record is a conviction of something called the Nterekeiya Bus Service can stand. We do not think that it can stand.

Let us imagine a state of affairs which favours the Republic so far as may be, and suppose that there is an unincorporated association or partnership which carries on a transport business under this name.

In s. 2 of the Interpretation & General Clauses Act "person" is defined as including "any company or association or body of persons corporate or unincorporate". Of course, the context must be studied when that definition is invoked, but we see no reason why the word "person" in s. 55 (1) of the Traffic Act should not include an unincorporated association of persons. The offence created by the subsection is punishable with a fine, and the use of motor vehicles appears to us to be within the capacity of an unincorporated society.

Further the Penal Code clearly does envisage that unincorporated associations, societies, firms and the like can commit offences, for s. 23 of that Code begins, "Where an offence is committed by any company or other body corporate or by any society, association or body of persons . . .".

It clearly is the case that an unincorporated association is capable of committing fewer offences than a corporation yet it is we think permissible to speak of an unincorporated association committing an

offence. But it appears to us perfectly plain that a firm or unincorporated society of persons cannot be charged, convicted and punished in the name adopted by the firm or society.

That proposition is stated in Glanville Williams' Criminal Law (2nd Edn.), at the end of para. 279 thus:

"Unincorporated associations cannot be indicted in their collective name; the indictment must be against the individuals responsible."

Very much the same was said by Lord Goddard in the case of *Davey v. Shawcroft* (1) ([1948] 1 All E.R. at p. 828):

"If members of an unincorporated body commit an offence they can be prosecuted, but they must be charged or indicted individually."

It is to be noted that s. 19 of the Interpretation Act, 1889, defines "person" in practically the same way as does s. 2 of the Kenya Interpretation and General Clauses Act, and there is no reason to suppose that the law in England touching unincorporated bodies differs from the law of Kenya.

Neither the learned author of the text book to which we have referred nor Lord Goddard gave any authority for their propositions but the very nature of an unincorporated society puts the matter beyond argument.

We may perhaps be forgiven for quoting the very well known words of Farwell, L.J., in *Sadler v. Whiteman* (2) ([1910] 1 K.B. at p. 889):

"In English law a firm as such has no existence; partners carry on business both as principals and as agents for each other within the scope of the partnership business; the firm name is a mere expression, not a legal entity, although for convenience under Order 48A it may be used for the sake of suing or being sued."

Moreover it has been repeatedly decided in England that a firm or unincorporated society unlike a corporation has no existence apart from its individual members. The point was never perhaps more neatly illustrated than in the companion cases of *Wurzel v. Houghton Main Home Delivery Service, Ltd.* and *Wurzel v. James Atkinson, Walter Norfolk and James Ward* (3).

The Houghton Delivery Service Ltd., was an incorporated society, whose members consisted exclusively of persons employed at the Houghton Colliery and its business was the delivery of coal from the colliery to its members. Atkinson, Norfolk and Ward were members of and and traded as the Dearne Valley Home Coal Delivery Service. The Dearne Valley Delivery Service was an unincorporated society whose members consisted exclusively of persons employed at the Dearne Valley Colliery and its business was the delivery of coal from the colliery to its members. Each service used motor vehicles for its business under the cover of a private carrier's licence issued under the Road and Rail Traffic Act, 1933.

We will not go further into the details of these two cases but the form of information in each case is of interest.

Wurzel was the prosecutor. The accused in the first case as we have said was an incorporated society, and was of course charged by its corporate name, the Houghton Main Home Delivery Service Ltd. In the second case a society known as the Dearne Valley Home Coal Delivery Service carried on a business indistinguishable from that of the Houghton Service Ltd., and by and through individuals behaved in precisely the same way as the Houghton Main Service Ltd., the way complained of by Wurzel. But the Dearne Valley Service was an unincorporated society. Not only did this make all the difference to the criminality of the behaviour complained of, but the form of the information was of course, if we may be so emphatic, quite different.

Three responsible members of the Dearne Valley society were chosen and the

information was against those individuals, Atkinson, Norfolk and Ward “trading as Dearne Valley Home Coal Delivery Service”.

Where it is necessary to draw the attention of the accused and of the court to the fact that the individuals charged are alleged to be responsible for the activities of an association, club, partnership or other unincorporated body that form is surely unexceptionable.

We now turn to Kenya authorities. The earliest authority we can discover is the judgment of the Chief Justice of Kenya (Sir Joseph Sheridan) and Bartley, J., in the case of *R. v. Hirabhai Purshotam Patel and Naranbhai Somabhai Patel* (4). This case is reported as “Circular to Magistrates No. 17 of 1944” and signed by the Acting Registrar, Mr. De Lestang. There the charge read:

“Accused – The Ngara Stores, Traders, Nairobi.

Partners – 1. H. B. Patel

2. S. B. Patel

3. B. C. Patel (minor)

4. N. S. Patel.

Statement of offence:

Selling goods at a price in excess of the permitted selling price, etc., etc.”

The magistrate’s final word was, “I find the accused firm guilty and convict them.”

He sent two of the partners to prison. One of the partners was not before the court and nothing was done about him. S. B. Patel was not punished and the magistrate somewhat confusingly said, “I consider that no punishment should be imposed upon the partner S. B. Patel, who though a member of the accused firm, I have found to be innocent of the offence for which his two co-partners have been convicted and sentenced.”

This court having quoted the dictum of Farwell, L.J., which we have quoted and having pointed out the procedural difficulties which lie in the way of summoning and pleading a firm, went on to say:

“There is of course no procedure for bringing a firm before the court in the Criminal Procedure Code although naturally there is provision for service of a summons on an incorporated company or other body corporate. In so far as the charge in this case purported to charge the firm of Ngara Stores and in so far as the conviction purported to convict the firm, the charge and conviction are irregular in our opinion. As regards the charge, however, it clearly set out the names of the four partners in the Ngara Stores as accused persons and although it would have been better had the charge set out their names and afterwards described them as partners in the Ngara Stores instead of the charge taking the form it did we see no prejudice to the accused persons in the form adopted. The charge should not of course have included the name of the third accused who was in India and presumably never summoned to appear.”

The next Kenya case on the subject which we can discover is that of *Stephen Obiro v. R.* (5). Here Farrell, J., was faced with a case in which an unincorporated concern known as the Kenya African Food Sellers Union had been charged and convicted in that name of an offence contrary to the Maize Marketing Ordinance, 1959. Farrell, J., delivered a judgment of great clarity. He adverted to the English law, and mentioned the dictum of Goddard, L.J., in *Davey v. Shawcroft* (1). He set out very fully the procedural difficulties involved, and

concluded that though in Kenya an unincorporated body is capable of committing a criminal offence the proper method of enforcing the law is to bring proceedings against the individuals responsible for its management. He said, "Criminal proceedings do not lie against a body unincorporate".

Here then is an impressive weight of authority both in England and Kenya in support of the propositions that to charge an unincorporated society or firm in the name which it has adopted, to summon it in that name, to plead it in that name and to convict it in that name and to fine it in that name are things which for a variety of somewhat obvious reasons simply cannot be done in law.

We should have troubled with this case no further were it not that the year following the issue of Ngara Stores circular the Court of Appeal for Eastern Africa under the presidency of Sir Joseph Sheridan decided the Tanganyika case which may shortly be referred to as the *Jessa* case (6). In this case four members of the Jessa family who were described as "trading as Nurmohamed Jessa" were charged before a magistrates' court with being in possession of soap of a particular composition contrary to some Defence Order or another. The Court of Appeal said, "The four accused persons are admittedly partners of a firm . . . and it is clear they were charged as a firm". Now it is true that the magistrate convicted the firm of Nurmohamed Jessa and ordered the firm to pay a fine of Shs. 500/-.

The High Court of Tanganyika held that the magistrate had no authority to impose a fine on a firm. That court noted that two of the Jessas had been excused from attendance at the trial and that they were not therefore told what they could do at the close of the prosecution case. The High Court quashed what it called the conviction of those two Jessas, but upheld what it called the convictions of the other two Jessas. The fine of Shs. 500/- the High Court split into two parts, handing Shs. 250/- to the two Jessas whose convictions were quashed and retaining the Shs. 250/- as representing the share of the other two whose appeals were dismissed.

The decision of the High Court of Tanganyika followed very closely upon the decision of the Supreme Court of Kenya in the Ngara case Stores.

The Court of Appeal, which found all the convictions to be bad said:

"We must point out that the learned Judge of the High Court in holding that the magistrate had no authority to impose a fine on the firm overlooked the effect of the definition of "person" contained in the Interpretation Ordinance (Cap. 1, s. 2) as including "any body of persons, corporate or incorporate". That definition applied to Regulation 25 (1) in the present case clearly gave the magistrate authority in a proper case to convict and sentence a firm. It is for that reason that we order that the refund of fine should be made to the firm."

These words, which had not of course been uttered when the *Ngara Stores* case (4) was decided, and which were not cited to Farrell, J., in *Obiro's* case (5) (or indeed to us in the present case) are in conflict with much that Sir Joseph Sheridan, Bartley, J., and Farrell, J., have said. They are in conflict indeed with much that has been said in England.

However, though we cannot of course say that the Court of Appeal for Eastern Africa erred, we do not think that what they said governs the present case where, at the best for the prosecution, a firm name has been charged, convicted and fined. There is no warrant for that in the law of Kenya.

This conviction is a mere nullity, we think, and we quash it. The sentence of fine is set aside and the fine if paid must be returned to the person who paid it.

The appeal is allowed.

Appeal allowed. Conviction and sentence set aside.

For the appellant:

D. V. Kapila, Nairobi

For the Republic:

The Attorney General, Kenya

A. F. Kisevu (State Counsel, Kenya)

David Kasule v Uganda

[1966] 1 EA 338 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	23 September 1966
Case Number:	483/1966
Before:	Sir Udo Udoma CJ
Sourced by:	LawAfrica

[1] *Criminal law – Receiving stolen property – No proof that property subject matter of charge stolen or unlawfully obtained – No evidence as to ownership of property – Penal Code (Cap. 106), s. 298 (3) (U.).*

Editor's Summary

The appellant was convicted of receiving stolen property contrary to s. 298 (1) of the Penal Code. There was evidence that about sixteen car armatures were missing from the store of a car company and that the appellant attempted to sell an armature to a police officer when the police visited his shop in the course of their investigations. The appellant tried to run away when the police officer disclosed his identity and volunteered the information that the armature was a gift from one S. which was denied by S. The magistrate stated in his judgment that it had not been proved that the armature was one of the armatures stolen from the store nor could the company's manager positively identify it. One of the grounds of appeal was that the charge of receiving was not substantiated for want of proof that the armature was unlawfully obtained or disposed of under s. 298 (3) of the Penal Code.

Held – a person charged with receiving under s. 298 (1) of the Penal Code who does not plead guilty cannot be convicted unless the prosecution established under s. 298 (3) that the property the subject matter of the charge has in fact been stolen or feloniously or unlawfully taken, extorted, obtained,

converted or disposed of; *Kamadi Kaibale v. Uganda* distinguished.

Appeal allowed.

Cases referred to in judgment:

(1) *Kamadi Kaibale v. Uganda*, Uganda Criminal Appeal No. 2 of 1964 (unreported).

Judgment

Sir Udo Udoma CJ: The appellant was convicted of receiving stolen property contrary to s. 298 (1) of the Penal Code. He was sentenced to two years' imprisonment. This appeal is against conviction only.

There are four grounds of appeal as follows:

1. That the prosecution evidence did not disclose any theft of the armature which was the subject of alleged possession and the learned magistrate erred in finding otherwise.
2. That the charge of receiving was not substantiated in view of the provisions of s. 298 (3) Penal Code.
3. That in as much as it was not proved that the armature in question was one of the armatures stolen from the Cooper Motors Corporation, the doctrine of "recent possession" could not apply and the court erred in law in applying it. The prosecution case having been based on recent possession only it is contended that conviction could not result as such possession was not established.
4. That the learned magistrate did not direct himself sufficiently in law in dealing with the explanation of the appellant.

On or about March 17, 1966, as a result of stock-taking it was discovered that about sixteen car armatures were missing from the store belonging to Messrs. Cooper Motors Corporation, Kampala. The matter was reported to the Police, who immediately initiated investigation into the loss. In the course of their investigation the Police called at a shop where the appellant was selling scraps. At the shop Asst. Sup. Samuel Okello, who was then with some Detective Constables among whom was Sebastian Odiri, inquired from the appellant whether he had an armature for sale. The appellant answered in the affirmative and produced an armature (Ex. 1) from behind the stalls in the shop and offered the same for sale to Asst. Sup. Samuel Okello for Shs. 65/-. The armature was handed over to Asst. Sup. Samuel Okello.

After some haggling as to the price the appellant finally agreed to sell the armature (Ex. 1) to Asst. Sup. Samuel Okello for Shs. 30/-. While still having the armature (Ex. 1) in his hand, Asst. Sup. Samuel Okello disclosed his identity to the appellant. When the appellant heard that Samuel Okello was a Police Officer he tried to get away but was arrested by Det. Const. Sebastian Odiri.

After due caution the appellant volunteered the information that the armature Ex. 1) was a gift to him by Silvester Mukasa and immediately took the police to Silvester Mukasa's stall. On inquiry Silvester Mukasa, in the presence and to the hearing of the appellant, denied that the armature was given to the appellant by him.

The appellant was taken away and later charged by the Police with the offence of receiving or retaining stolen property. At the trial before the magistrate, Silvester Mukasa, who was called as a witness for the prosecution, reaffirmed his denial on oath.

In the course of the trial David Andrew Hymas, the Store Manager of Messrs. Cooper Motors Corporation, Kampala, who was called as a witness for the prosecution, was not able positively to identify the armature (Ex. 1) as the property of Cooper Motors Corporation. He was only able to say that it was similar to the armatures in which the Corporation deals. Nor was he able to say positively that the armature (Ex. 1) was one of those missing from the Corporation's Store.

In his defence the appellant swore that he had bought the armature (Ex. 1) for Shs. 80/- and that he had offered the same to the Police for Shs. 110/- and not for Shs. 65/- or for Shs. 30/- as testified to by Asst. Sup. Samuel Okello. In support of his story that he had bought the armature (Ex. 1), the appellant produced and tendered as exhibit 2 a delivery note or invoice purported to have been issued by Auto & Machinery Parts Ltd. dated February 2, 1966, concerning one armature apparently sold for Shs. 125/-. The appellant explained that, although the price on the invoice of the armature is Shs. 125/-, that was the price

paid for the armature by someone who had sold a VW car to him and that that person, who was not named, had sold the armature to him for Shs. 80/-.

In his judgment the learned trial magistrate accepted the evidence of the witnesses for the prosecution as the truth; and, after having critically examined the evidence of the appellant, he quite rightly, I think, rejected it apparently in so far as such evidence was in conflict with the evidence of the prosecution. The learned trial magistrate, in concluding that the appellant was an untruthful witness, observed in effect that the story told by the appellant in the witness box, which was at variance with the explanation that the appellant had given to the Police in the course of their investigation, was an afterthought. He held that he was not persuaded that the invoice (Ex. 2), produced by the appellant was a bona fide document handed to him by the anonymous car seller referred to by the appellant. That conclusion on the evidence cannot be faulted; and has not in fact been criticised by counsel for the appellant.

At the hearing of this appeal counsel for the appellant, submitted on the four grounds of appeal, which, by leave, were argued together, that the decision of the trial magistrate that the appellant was guilty was wrong in law as the charge of receiving stolen property was not established on the evidence of the prosecution and in the light of the provisions of s. 298 (3) of the Penal Code. It was further contended by counsel that the prosecution had failed both to identify and to prove by evidence that the armature (Ex. 1) was the property of Cooper Motors Corporation, and, in particular, that it was one of those missing from the Corporation's store; and that the case of *Kamadi Kaibale v. Uganda* (1) relied upon by the learned trial magistrate was irrelevant to the issues in controversy in the instant case, which issues concern the identification of the armature as the property of Cooper Motors Corporation and the theft thereof.

I turn now to consider these submissions, and I start by referring to *Kamadi Kaibale v. Uganda* (1) (unreported but mentioned in this court's Bulletin No. 60, published as No. 2/64 in January, 1964), which the learned trial magistrate had considered binding on him and upon which he relied as fortifying his conclusion that to establish a charge of receiving under s. 298 (1) of the Penal Code proof of ownership of the property received was not necessary.

Having carefully examined the judgment in that case, I agree with counsel for the appellant that the decision by Bennett, J., in *Kamadi Kaibale v. Uganda* (1) is irrelevant to the issues raised at the trial in the instant case.

In *Kamadi Kaibale* (1) the contention on behalf of the appellant therein in reference to the definition of theft in s. 245 of the Penal Code was that the appellant therein ought not to have been convicted of theft because there was no evidence of ownership of the property alleged to have been stolen. It was held by the court in reference to the issue of ownership that, while there might be cases where it was essential to prove special ownership of property in order to secure a conviction on a charge of theft, there was no general proposition of law that the ownership of property alleged to have been stolen must be proved for all cases of theft. Further, that it was open to the prosecution to charge a person with theft of the property of a person unknown; and that by the authority of the provisions of s. 136(c)(i) of the Criminal Procedure Code it was not necessary, in drafting a charge or an indictment for theft, to name the person to whom the property belonged. With respect, I am of opinion that the learned trial magistrate was wrong in relying on this case as supporting the conclusion he had reached in considering the evidence in the instant case.

In dealing with the issue of ownership of the armature (Ex. 1) which was raised in relation to the question of identification thereof, the learned trial magistrate found that both the ownership and the

identify of the armature (Ex. 1) had not

been established by evidence. On the specific issue of identification the learned trial magistrate expressed his finding in very strong terms. He said:

“Therefore in so far as identification of the armature is concerned, though it may be regarded as one of the pieces stolen from Cooper Motors *it could not be by any stretch of imagination considered as conclusive evidence* that it is the very same armature stolen from Cooper Motors.”

And further, in answering the question:

“How far has the prosecution brought the charge home in law to the appellant in so far as the possession of the stolen armature is concerned?,”

which he had put to himself, the learned trial magistrate said:

“It is not definitely proved that the armature (Ex. 1) is one of the fifteen armatures stolen from Cooper Motors on or before March 16 or 17, 1966.”

In spite of that conclusion, the learned trial magistrate proceeded to deal with the question as to whether or not the charge against the appellant should fail because the prosecution had failed to establish that the armature (Ex. 1) was the property of Cooper Motors Corporation, that being the submission which had been made to him by counsel for the appellant at the trial. After considering the matter in some detail, the learned trial magistrate concluded that on the authority of *Kamadi Kaibale v. Uganda* (1), which he had held as binding on him, as the appellant was in possession of the armature (Ex. 1) on March 17, 1966 “in the circumstances evinced by his subsequent conduct, from which I can undoubtedly infer the falsehood of his story” the appellant was guilty, and thereupon convicted him as charged contrary to s. 298 (1) of the Penal Code.

The learned magistrate reached that conclusion without directing his mind at all to s. 298 (3) of the Penal Code. In the whole of the proceedings of the trial and judgment there was no reference made by the trial magistrate to that section of the Penal Code, the provisions of which are as hereunder set forth:

“298 (3) No person, save a person pleading guilty, shall be convicted of an offence under this section unless it shall first be proved that the property which is the subject-matter of the charge *has in fact been stolen or feloniously or unlawfully taken, extorted, obtained, converted or disposed of.*”

Thus while s. 298 (1) and (2) of the Penal Code create the offences of receiving or retaining stolen property and of receiving or retaining property unlawfully obtained, etc. respectively, the provisions of s. 298 (3) of the Code lay down the conditions which must be established or proved in order to secure a conviction on charges laid under s. 298 (1) and (2) of the Penal Code. Therefore, to put it negatively, a person charged under s. 298 (1) or (2) of the Penal Code, who does not plead guilty to such a charge or charges, cannot be convicted unless the prosecution has successfully and to the satisfaction of the court established by evidence that the property the subject-matter of the charge has in fact been stolen or feloniously or unlawfully taken, extorted, obtained, converted or disposed of.

Applying the law as contained in s. 298 (3) of the Penal Code to the facts and circumstances of the instant case, the question which must be answered in order to ascertain whether the decision of the learned trial magistrate that the appellant was guilty was right must be:

Does the evidence of the prosecution or indeed in the whole case satisfy the condition precedent provided for in s. 298 (3) of the Penal Code? In other words, did the prosecution successfully establish by evidence that the armature (Ex. 1), the subject-matter of the charge, was one of the fifteen armatures, property of Cooper Motors Corporation alleged to be missing?

The answer to this question must be in the negative, having regard to the findings of the learned trial magistrate on considering the evidence in the whole case. As already indicated the learned trial magistrate had found as a fact:

- “1. that it could not be by any stretch of imagination considered that it (i.e. the armature, Ex. 1) is the very same armature stolen from Cooper Motors” – and
- “2. it is not definitely proved that the armature, Ex. 1, is one of the fifteen armatures stolen from Cooper Motors on or about March 16 or 17, 1966.”

By the above findings it is quite clear that the learned trial magistrate had virtually concluded that the case of the prosecution must fail since the condition precedent to securing a conviction of a person charged with receiving stolen property required under s. 298 (3) of the Penal Code had not been satisfied.

That being so, I am of opinion and hold that the learned trial magistrate committed an error in law in his conclusion that the appellant was guilty of receiving stolen property contrary to s. 298 (1) of the Penal Code. It may be that, if the prosecution had successfully proved by evidence that the armature (Ex. 1) was the property of Cooper Motors Corporation, the trial magistrate might have been able to draw the inference that the armature (Ex. 1) must be one of those stolen from the store of Cooper Motors Corporation; and therefore that the appellant must be either the thief or a receiver, having regard to the inconsistent stories told by the appellant to the police and the court, and his conduct throughout the trial. In the absence of such proof the appellant should have been acquitted.

This appeal is allowed. Conviction of and the sentence imposed upon the appellant are quashed. The appellant is acquitted and discharged.

Appeal allowed.

For the appellant:

Dalal & Singh, Kampala

S. H. Dalal

For the respondent:

The Attorney General, Uganda

A. M. Khan (State Attorney, Uganda)

Fatehali Manji v The Republic

[1966] 1 EA 343 (CAN)

Division: Court of Appeal at Nairobi

Date of judgment: 15 July 1966

Case Number: 32/1966

Before: Sir Clement de Lestang Ag P, Spry Ag VP and Law JA

Sourced by: LawAfrica

Appeal from: The High Court of Tanzania – Bannerman, J.

[1] *Criminal law – Practice – Retrial – Principles upon which court should order retrial restated.*

Editor's Summary

The appellant was charged with the theft of a self-starter. The prosecution alleged that it was stolen from a vehicle at Arusha on June 6, 1965, and that the appellant had it in his possession eight days later when it was resold. The appellant's defence was that he had purchased the self-starter from a shop in Nairobi on June 10, 1965, and he produced a receipt. The prosecution led hearsay evidence without leave that the shop did not exist. The magistrate called a police officer from Nairobi whose evidence he accepted, to testify that the shop did not exist. The appellant was convicted. On appeal to the High Court, leave was given to adduce additional evidence to establish the existence of the shop; eventually the prosecution conceded that the police officer was in error and the judge ordered a retrial, being influenced by the inadmissible evidence. On further appeal to the Court of Appeal the question for decision was whether the order for retrial was justified or not.

Held –

- (i) in general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its own facts and circumstances and an order for retrial should only be made where the interests of justice require it;
- (ii) the original trial was neither illegal nor defective and in the circumstances of the case it would be unfair to require the appellant to stand a new trial.

Appeal allowed. Order for retrial set aside.

Cases referred to in judgment

- (1) *Ahmedi Ali Dharamshi Sumar v. Republic*, [1964] E.A. 481 (T.).
- (2) *Salim Muhsin v. Salim Bin Mohamed and Others* (1950), 17 E.A.C.A. 128 (U.).

Judgment

Sir Clement De Lestang Ag P, read the following judgment of the court.

The appellant was convicted in the District Court of Arusha of the theft of a self-starter from a motor vehicle and sentenced to nine months' imprisonment. The case for the prosecution was that the starter was stolen from the vehicle at Arusha on June 6, 1965, and that the appellant had it in his possession eight

days later when it was sold to somebody else. The appellant's defence at the trial was that he had purchased the self-starter from a firm called Grogan Auto Spares in Nairobi on June 10, 1965, in support of which he produced a receipt. The prosecution alleged that the shop did not exist and led hearsay evidence in support of its allegation. Thus an issue arose as to the existence of that shop. To resolve that issue the learned magistrate decided to call a police officer from Nairobi who testified that the shop did not exist and whose evidence the learned magistrate accepted. As a result he held that the appellant had not given an explanation which could possibly be true and convicted him. The appellant appealed to the High Court on a number of grounds, including the reception of inadmissible evidence. He obtained leave from the High Court to adduce additional evidence for the purpose of establishing the existence of the shop and eventually the prosecution conceded that the police officer called by the learned magistrate at the trial was in error and that the shop in question existed. The prosecution also conceded that inadmissible evidence had been received at the trial; whereupon the learned judge intimated that he proposed to order a retrial. We think that his attitude was clearly influenced by certain papers filed by the prosecution without leave purporting to set out the evidence of witnesses which the prosecution intended to call for the purpose of establishing the falsity of the receipt produced by the appellant at the trial. Counsel for the appellant objected to the course proposed by the learned judge on the ground that it would permit the prosecution to put up a different case from that at the trial and be unfair to the appellant. The learned judge, however, quashed the conviction and ordered a retrial and, in doing so, had regard again to the papers filed by the prosecution without leave.

The question for decision in this appeal is whether the order for retrial was justified or not. Section 319(1)(a)(i) of the Criminal Procedure Code of Tanganyika, under which the order for retrial must have been made, appears to give the High Court on appeal an unlimited discretion as to ordering a retrial but, as was pointed out in *Ahmedi Ali Dharamsi Sumar v. Republic* (1) ([1964] E.A. 481 at p. 482), quoting excerpts from the judgment in *Salim Muhsin v. Salim Bin Mohamed and Others* (2) "... discretion must be exercised in a judicial manner and there is a considerable body of authority as to what is and what is not a proper judicial exercise of this discretion." We will not quote the other passages in full but we will content ourselves with stating the principles which emerge from them. They are the following: in general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its particular facts and circumstances and an order for retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause an injustice to the accused person.

Applying those principles to the present case, it is clear that the original trial was neither illegal nor defective. We think that had the learned magistrate not been misled regarding the existence of the shop in question he would, in all probability, have acquitted the appellant and a new trial may deprive the appellant of that chance of acquittal. Moreover, in a new trial the prosecution would be able to lead evidence which it had not led at the original trial and take a stand different from that which it took at the trial. In all these circumstances we are

of the view that to require the appellant to stand trial again would be unfair. The appeal is accordingly allowed and the order of retrial set aside.

Appeal allowed. Order for retrial set aside.

For the appellant:

Mustafa, Behal & Vohora, Arusha

A. R. Kapila

For the respondent:

The Attorney General, Tanzania, Dar-es-Salaam

J. Maynard

Uganda v Nikolla and another [1966] 1 EA 345 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	20 September 1966
Case Number:	426/1966
Before:	Sir Udo Udoma CJ
Sourced by:	LawAfrica

[1] *Criminal law – Adultery – Adulteror unmarried – Not known to adulteror that adulteress was married – Whether absolute liability – Penal Code, s. 150a (U.).*

[2] *Criminal law – Charge – Adultery – Both adulteror and adulteress charged in one count – Mens rea – Desirable that should be charged on two counts.*

Editor's Summary

N. and M. were jointly charged with “wilfully and unlawfully” committing adultery contrary to s. 150a of the Penal Code though these words do not appear in the section. At the trial evidence was led that M. was married to T. in 1959 according to native law and custom but that some years later she deserted her husband and rejoined her brother and that she now lived with N. M. testified that she had deserted T. and had lived with her brother, for three years before her marriage to N. and that ever since, she had lived with N. as husband and wife. N.’s defence was that he came to know M. for the first time when the brother offered her to him in marriage as an unmarried woman and that he married her with her consent according to native law and custom. The trial magistrate held that although N. did not know that M. was married at the time he married her, since M. had not been legally divorced, N. and M. had committed adultery. The case came before the Chief Justice on revision on the application of the acting chief

magistrate who reported that the conviction was wrong in law because the charge was bad for duplicity in that there were two distinct offences committed by the two accused and that the two offences were lumped together in one count. In addition to this point the learned Chief Justice discussed the question whether s. 150a created any absolute liability.

Held –

- (i) it is undesirable in adultery cases that both the man and the woman should be charged, but if charged, there should be separate counts because the mens rea in each case is different;
- (ii) the charge as framed was not supported by the evidence: to convict either or both the accused persons it was necessary to establish mens rea;
- (iii) the absence of the word “knowingly” or “wilfully” from the provisions of s. 150a merely relieved the prosecution from proving knowledge or wilfulness on the part of the person charged with the offence and it was plain that the section did not contain an absolute prohibition of the offence of adultery; it was open to an accused person to show that in fact he did not know that the woman was married to any other person.

Convictions and sentences set aside.

Cases referred to in judgment:

- (1) *Brend v. Wood* (1946), 62 L.T.R. 462.
- (2) *R. v. Tolson* (1889), 23 Q.B. 168.
- (3) *Harding v. Price*, [1948] 1 K.B. 695.
- (4) *Nicholls v. Hall* (1873), L.R. 8 C.P. 322.
- (5) *R. v. Cohen* (1858), 8 Cox C.C. 41.

Revision Order made in chambers. Neither party appeared.

Judgment

Sir Udo Udoma CJ: This is an application by the acting chief magistrate, Gulu, for a revisional order setting aside the conviction of and the sentences imposed on the two accused persons by the magistrate grade II, Magistrates' Court, Biliafa, West Nile, on the ground that the charge is bad in law because "it is not clear from the charge who of the two accused persons had committed adultery and with whom".

The two accused, Nikolla Felle and Maria Timona, were charged with having committed adultery contrary to s. 150a of the Penal Code.

As framed, the charge was in the following terms:

"Statement of offence

Committing adultery contrary to s. 150a of the Penal Code.

Particulars of offence

That on the 4th day of December, 1965, at about 8 p.m. at Isiku Village, Bileafe Division, Terego County, you did wilfully and unlawfully commit adultery."

At the trial, in exercise of their rights under s. 10 and s. 18 of the Criminal Procedure Code, both accused elected to be tried by the magistrate grade II, and pleaded, as recorded in their own words, in the following terms:

- | | |
|-----------------|--|
| "First accused: | Maria is married to me. She is not the complainant's wife. I married Maria Ozuru as an unmarried woman, for me as a wife. |
| Second accused: | I am not the complainant's wife. I know I was married to the complainant without paying dowry or dowries to my people. I left him and got married to the first accused because the complainant used to insult me, my mother and also he was beating me very much." |

Thereupon the court entered for the two accused pleas of not guilty and their trial commenced.

Only two witnesses, Timona Ajoma described as the husband of Maria, second accused, and Madia Etu-alua, described as the go-between (i.e. drile), gave evidence for the prosecution. In his evidence, Timona Ajoma swore that Maria, the second accused, was his wife according to native law and custom;

that they both got married in 1959, the dowry paid by him being five head of cattle and eight goats; that both of them had lived together from 1959 to January, 1966; that of the two children of the marriage, only one had survived; that during the time they had lived together, Maria, the second accused, on one occasion deserted him and rejoined her brother, Aseri Adrati; that later, however, the dispute was settled and Maria was ordered to return to him, which she did; but that thereafter the second accused finally deserted him when he, himself, was away at the Rhino Camp; and that since then, even though they had not been divorced, the second accused had been living with the first accused.

Under cross-examination by the second accused, Timona Ajoma denied that his brother-in-law, that is, Aseri Adrati, had demanded a cow or bull from him for the purpose of appeasing him of his anger as his condition precedent for allowing the second accused to join him after the settlement of the dispute before the Chief; and that he had refused to pay the said cow or bull.

The evidence given by Timona Ajoma was corroborated by Madia Etu-alua the go-between, except as to the amount paid as dowry. In contrast to the evidence of Timona Ajoma to the effect that the dowry paid by him was five head of cattle and eight goats, Madia Etu-alua swore that the dowry paid by Timona Ajoma, which as was his duty he had delivered to Aseri Adrati, was only three heads of cattle and eight goats and a bull.

Under cross-examination, he admitted that it was true that the second accused was married to the first accused under native law and custom and that it was for that purpose that the second accused was withdrawn from Timona Ajoma by her brother, Aseri Adrati.

In his defence, the first accused, Nikolla Felle, swore that he only came to know the first accused when for the first time her brother, Aseri Adrati, offered her to him in marriage as an unmarried woman; that he accepted the offer and thereupon, with her consent, they were both engaged to be married and subsequently got married, and that the dowry paid by him for the marriage of the second accused was three cows, five goats and Shs. 70/-, according to custom.

Under cross-examination, he said that if he had known that the second accused was married to anyone at the time, he would not have ventured to accept the offer made to him by his brother-in-law, Aseri Adrati.

The second accused testified that she had deserted Timona Ajoma and had lived with her brother Aseri Adrati for three years before her marriage to the first accused, and that ever since she had lived with the first accused as husband and wife until this prosecution was initiated by Timona Ajoma.

In his testimony Aseri Adrati, called as a witness for the defence, admitted that it was true that he had offered the second accused in marriage to the first accused, for which the latter had paid to him two cows and two goats and that he had refused to allow the second accused to re-join Timona Ajoma, because the latter had refused to pay to him one more cow to add to the two cows and two goats previously paid to him by Timona Ajoma, in order to complete the dowry.

In his judgment, the magistrate grade II in summing up the case for the prosecution and that for the defence, held that the case of the prosecution was that the second accused was the wife of Timona Ajoma but that she was abducted by the first accused, who later married her; and that the defence on the part of the first accused was that he did not know that the second accused was married at all. Finally, the trial magistrate concluded that, although the first accused did not know that the second accused was married at the time he contracted marriage with her, since the second accused had not been legally divorced, the first accused and the second accused had committed adultery, and were therefore guilty. He thereupon convicted both of them and sentenced the first accused to ten months' imprisonment, ordered him to pay compensation of Shs. 600/- to Timona Ajoma. The second accused was cautioned and discharged.

The acting chief magistrate now complains that the conviction was wrong in law because, in effect, the charge was bad for duplicity in that there were two distinct offences committed by the two accused persons and that the two offences were lumped together in one count.

I think that the point has been well taken. This court has pointed out on more than one occasion that

where it is alleged that a man and woman had committed

adultery, it is undesirable, except in cases where both are likely to plead guilty, that both of them be charged; or, if charged, that both be joined in one count.

One would have thought that by reason of the difficulty of proof common prudence would dictate that only one of them should be charged. Furthermore, although adultery, as a criminal offence created for the first time under s. 150a of the Penal Code, in 1964, has not been legally defined, it seems to me that an allegation that a man and woman have committed adultery must carry the implication that the man having known that the woman was married to another man unlawfully had sexual intercourse with her. Similarly that the woman with the full knowledge that she was married to someone unlawfully had sexual intercourse with another man not her husband. In which case both the man and the woman would be accomplices. The act of adultery by either of them is a separate offence since the mens rea required to constitute the offence in either case is different. Therefore, where both are charged it is desirable that there should be two separate counts, one for the man and the other for the woman.

Apart from the defect in the charge, there are a number of unsatisfactory features in the trial of this case and the conviction of the accused. The charge as framed was not supported by the evidence. There was no evidence, for instance, that the two accused did in fact commit adultery with each other on December 4, 1965, at 8 p.m. as alleged in the charge.

The trial magistrate failed to direct his mind properly and correctly to the evidence. In the charge it is alleged that both accused had wilfully and unlawfully committed adultery with each other, so that from the manner in which the charge was framed, to convict either or both accused persons, it was necessary that mens rea be established on the principle of the maxim “actus non facit nisi mens sit rea”.

The defence of the first accused was that the second accused was his wife married under native law and custom, for which he had paid a dowry and that he did not know she was married to another man at the time her brother offered her to him in marriage.

The defence by the first accused was accorded only scant attention by the trial magistrate even though in his judgment he acknowledged by implication that the prosecution’s case was based on the belief that the accused persons were married according to native law and custom, the defence being based on ignorance of the fact that the second accused was married to any other person at the time she was married to the first accused. In view of such findings it was wrong in law for the trial magistrate to have reached the conclusion that the first accused was guilty of adultery as charged. In law ignorance of fact is a good defence to a criminal charge.

In concluding his judgment the magistrate maintained that he had no alternative but to convict the accused because strict liability is imposed by the provisions of s. 150a of the Penal Code and therefore in effect mens rea was not required. The provisions of s. 150a of the Penal Code referred to by the magistrate are as follows:

“Adultery.

- 150a (1) Any man who has sexual intercourse with any married woman not being his wife commits adultery and shall be liable on conviction to imprisonment for a term not exceeding 12 months or to a fine not exceeding Shs. 200/-; and in addition the court shall order any such man on first conviction to pay the aggrieved party compensation of Shs. 600/-, and on a subsequent conviction compensation not exceeding Shs. 1,200/- as may be so ordered;
- (2) Any married woman who has sexual intercourse with any man not being her husband commits adultery and shall be liable on first conviction

to a caution by the court and on a subsequent conviction to a term of imprisonment not exceeding six months.”

There is no doubt that looking at s. 150a of the Penal Code set out above, the omission of the word “knowingly” or “unlawfully”, which should normally import mens rea as a constituent of the offence of adultery, is quite significant. Such an omission does appear at first sight to give the impression that the liability created in this section is a strict one. I think, however, that it would be wrong to hold that it was the intention of the legislature to impose strict liability for the offence of adultery to the extent that, as in this case, a person who, in ignorance of the fact that a woman was married to another man, marries her according to native law and custom and thereafter has sexual intercourse with her as his wife would commit the offence.

In my view as this is a penal statute it must be liberally interpreted and applied. It is a rule of law that unless a statute either strictly, clearly or by necessary implication rules out mens rea as a constituent element in the commission of a crime, the court should not find a man guilty under the criminal law unless he has a guilty mind. That principle was enunciated by Lord Goddard, C.J., in *Brend v. Wood* (1).

Because of the utmost importance attached to the concept and protection of the liberty of the individual person, it is necessary that courts should always bear in mind that fundamental rule in construing penal statutes.

There are other instances where the rule was considered and upheld by the courts in England.

In *R. v. Tolson* (2) the prisoner was convicted of bigamy for having gone through a ceremony of marriage within seven years after she had been deserted by her husband contrary to the offences against the Person Act, 1861, s. 57.

The jury at the trial had found that at the time of the second marriage she in good faith and on reasonable grounds had believed her husband dead.

It was held by the Court of Appeal that a bona fide belief on reasonable grounds in the death of the husband at the time of the second marriage afforded a good defence to the indictment.

In *Harding v. Price* (3), it was held that, although the word “knowingly” did not appear in s. 22 of the Road Traffic Act even though that word had appeared in a corresponding section (s. 6) of a repealed Motor Car Act, 1903, the omission of that word in the re-enacting section merely relieved the prosecution of the burden of proving knowledge on the part of the defendant, and that it did not follow that the driver might not set up and prove lack of knowledge.

In his judgment, Lord Goddard, C.J., said ([1948] 1 K.B. at p. 700):

“For the prosecution it was and is contended that an absolute duty to report has been imposed by the statute, and that in consequence a person must drive so carefully that he must know if an accident has happened, or at least that it is no defence to prove that he did not know.

While therefore under the Act of 1903 it was necessary for the prosecution to prove that the defendant knew of the accident, it is now no longer necessary for them to prove knowledge, but it does not follow that the defendant may not prove lack of knowledge as a defence. The general rule applicable to criminal cases is ‘actus non facit nisi mens sit rea’.”

In the case of *Harding v. Price* (3) it was said per in curiam:

“If a statute contained an absolute prohibition against the doing of an act, as a general rule mens rea was not a constituent of the offence; but there was for this purpose a difference between a statutory provision

prohibiting an act and one imposing a duty to do something on the happening of an event.”

See also *Nicholls v. Hall* (4).

Thus, on the principles established in the above cases, the mere absence of the word “knowingly” or “unlawfully” or “wilfully” in a criminal statute does not preclude an accused person charged under such a statute from alleging and proving by evidence that he did not know of a situation necessary to constitute that offence. In other words he would be quite entitled to prove that he was ignorant of certain facts and circumstances necessary to constitute the offence, in which case, if such explanation is accepted by the court, he would be entitled to an acquittal. The absence of the word “knowingly” or “wilfully” from the provisions of s. 150a of the Penal Code merely relieves the prosecution from proving knowledge or wilfulness on the part of the person charged with the offence.

It is plain that s. 150a of the Penal Code does not contain an absolute prohibition of the offence of adultery. It does not say, for instance, that no man shall commit adultery with the wife of another man. It merely says that if a man shall commit adultery with another man’s wife he shall be guilty of the offence known as adultery.

In *R. v. Cohen* (5) it was also held that although the word “knowingly” was not used in 9 & 10 William 3, c. 41, knowledge was still necessary in order to convict a person charged under that Act and therefore the absence of knowledge would be a good defence.

In his judgment in that case Watson, B., said ((1858), 8 Cox C.C. at p. 42):

“I am of opinion that it is necessary in order to convict a person under this statute of having naval stores marked with the broad arrow in his possession, to show not only that he had them in his possession, but that he also knew the nature of the articles, and that they were marked with the broad arrow. The statute is no doubt couched in very general terms; it does not state in so many words that he must have them in his possession “knowingly” but that must be the true meaning of the statute.”

Although this court is not bound by the above decisions of the courts in England, I think it is correct to say that they appear so cogently right that they cannot be ignored. They are so eminently just that they must in the interests of justice influence this court in its decision in this case.

I think it would do infinitely more injustice if it were to be held that mens rea was not essential in order to establish the offence of adultery created by s. 150a of the Penal Code. To so hold would not be carrying into effect the intentions of the legislature, having regard to the fact that to so hold, prosecution in adultery cases would soon become a racket in the courts of magistrates grades II and III, which alone at present deal with these cases and before whom the prosecutors are invariably the alleged offended husbands.

In my view it would be competent for an accused person charged with having committed adultery with a married woman to show by evidence that in fact at the time of the commission of adultery he did not know that the woman was married to any person.

For these reasons the magistrate grade II was wrong in law to have considered the provisions of s. 150a of the Penal Code as creating absolute liability. The conviction of the accused persons is set aside. They are acquitted and discharged.

Convictions and sentences set aside.

**Abdul Aziz Suleman v Igembe Farmers Co-Operative Society Ltd and
another**
[1966] 1 EA 351 (HCK)

Division: High Court of Kenya at Nairobi
Date of judgment: 20 April 1966
Before: MF Patel, Deputy Registrar and Taxing Officer
Sourced by: LawAfrica

[1] Costs – Taxation – Apportionment – Instructions fee – Nine applications for striking out plaint in nine separate suits – Same parties – Consolidation of cases for purpose of hearing the application – Application dismissed with costs – Order for costs in all nine cases – Nine separate bills filed claiming similar sums for instructions – Whether one consolidated bill should be filed.

Editor’s Summary

The plaintiff filed nine separate suits against both defendants. The second defendant in each case took out a notice of motion under O.VI, r. 29 of the Civil Procedure (Revised) Rules, 1948, seeking an order that the plaint be struck out insofar as it sought relief against it. The plaintiff and the second defendant in each case were the same parties and so also were their respective counsel. At the hearing all the nine cases were consolidated by consent for the purposes of the second defendant’s application which was dismissed with costs, and the trial judge stated in his ruling that “There will be a similar order in the other eight cases also”. Consequent upon this order the plaintiff’s advocate lodged nine separate bills for taxation and claimed Shs. 500/- instructions fee in each case. He submitted that there were no common instructions, that each case carried its own instructions fee, that in assessing the fee the taxing officer was not entitled to look at the other cases, that instructions were incurred before the order for consolidation was made and that consolidation took place only insofar as the hearing was concerned. Counsel for the second defendant challenged the quantum of the instructions fee; asked for apportionment; contended that the allegation against the second defendant in each case was identical to all intents and purposes, and while he conceded the instructions fee as claimed in the main case he maintained that only a basic fee be allowed in each of the other cases.

Held –

- (i) there was a clear case for apportioning the costs between all the suits since there was a consolidation of the cases insofar as the second defendant’s application was concerned;
- (ii) in the absence of any specific directions from the trial judge on the question of costs it fell upon the taxing officer to tax the costs of the plaintiff in a manner which was consistent with the prevailing practice in such matters even though an award for costs was made in each case;
- (iii) as the cases were consolidated for the purposes of the second defendant’s application, the plaintiff ought to have filed one consolidated bill of costs in the main case.

Order for an instructions fee of Shs. 500/- in the main bill and a basic instructions fee of Shs. 50/- in the other eight bills.

Cases referred to in judgment:

- (1) *Oppenshaw v. Whitehead* (1854), 9 Exch. 384.
- (2) *Re Metropolitan Coal Consumers Association* (1890), 45 Ch.D. 606.
- (3) *Boguslawski v. Gdynia*, [1951] 2 All E.R. 113.
- (4) *English v. Blooms and the London Passenger Transport Board*, [1936] 2 All E.R. 1592.
- (5) *The Bosworth (No. 2)*, [1960] 1 All E.R. 729.

(6) *Vincenzini v. Regional Comr. of Income Tax*, unreported Civil Appeal No. 59 of 1959.

(7) *Nazerally v. Comr. of Income Tax*, [1964] E.A. 52.

Judgment

The Taxing Officer (MF Patel): There are nine bills before me for taxation lodged by the plaintiff in each of the nine cases being Nos. 989, 977, 978, 979, 980, 981, 982, 988 and 990 of 1965. These bills relate to a notice of motion taken out by the second defendant in each of the nine cases under O.VI, r. 29 of the Civil Procedure (Revised) Rules, 1948, which sought orders in each case that the plaint be struck out insofar as it sought relief against the second defendant, and that the suit be dismissed with costs. The plaintiff and the second defendant in each case are the same, and so also are their respective counsel, and I think this fact has a great bearing on this taxation in the circumstances which are outlined in the next paragraph.

At the hearing all the nine cases were, by consent of the parties and with the approval of the court, consolidated for the purposes of the second defendant's application in each case. The consolidated motion was argued for one full day, and the ruling was reserved. Subsequently it was dismissed with costs, and the learned judge who heard it said in his ruling that "There will be a similar order in the other eight cases also".

The plaintiff's advocates have raised an instructions fee of Shs. 500/- in each of the nine cases for opposing the second defendant's motion, and have filed separate bills in each case. Counsel for the second defendant seriously challenges this figure. At first he submitted that the basic fee of Shs. 50/- would be reasonable in each of the nine cases in view of the nature of the application which he said was identical in each case. His argument was that the allegation against the second defendant in each of the nine complaints was identical to all intents and purposes, and the only relevant consideration was the words used in the complaints, and since the words used in each case were identical he submitted that the same consideration of law, and not facts, was involved in each case insofar as the second defendant's application was concerned. In the end he conceded that he would not object to the instructions fee being allowed as claimed in the case in which the consolidated motion was argued, viz.: C.C. 989 of 1965, but he maintained that only a basic fee be allowed in the other cases.

Counsel for the plaintiff argued that there were no common instructions in these cases, that "each case carries its own instructions fee", and that in assessing the instructions fee I am not entitled to look at other cases. He says instructions were incurred before the order for consolidation was made, and consolidation took place only insofar as the hearing was concerned. There is a straight order costs in each case, and a taxing master has no power to whittle down the order of costs, he argues. He submits that a substantial fee commensurate with work should be allowed in each case.

I have carefully considered the argument addressed to me on this taxation and the authorities cited by counsel for the plaintiff in support of his argument. In my view here is a clear case for apportionment of costs since there was a consolidation of the cases insofar as the second defendant's application was concerned. I do not think it is correct to say that apportionment of costs need only be made and would only be warranted in cases where, by agreement of the parties, one out of a number of cases is made a test case, others to abide the result in the test case. It is equally warranted and must in my view be made in the instant cases before me in view of the consolidation. True it is that the plaintiff was awarded costs

of the motion in each of the nine cases, but in the absence of any

specific directions from the learned judge on the question of costs I think it falls upon me as taxing master of this court to tax the costs of the plaintiff in a manner which is consistent with the prevailing practice in such matters.

Coming to the authorities cited by counsel for the plaintiff, I do not think the case of *Oppenshaw v. Whitehead* (1) helps him and is of any assistance to me in the circumstances of the cases now before me. There was no consolidation as here. Pollock, C.B., is reported to have said as follows ((1854), 9 Exch. at p. 384):

“We therefore think that where the business has been actually done, the Master ought not to take into consideration that the same attorney was employed by two or more plaintiffs, *unless indeed there has been a consolidation of the actions.*”

The underlining of the words (here printed in italics) is mine, and these words clearly show that *Oppenshaw’s* case is not in point on this taxation.

So also the case of *Re Metropolitan Coal Consumers’ Association* (2) is not in point. There was no order or agreement there that “the result of one shall govern the other”. See the headnote in the case, which does not assist counsel for the plaintiff either.

The case of *Boguslawski and Another v. Gdynia* (3) is also of no assistance to counsel for the plaintiff as “no order for consolidation was made, nor did the parties agree that the first action should be a test case”. On the contrary the decision in that case would seem to support my view. There it was held as follows:

“The mere fact that it was agreed between the parties that evidence taken in the first action should be treated as evidence in the second and third actions did not afford any ground for the apportionment of the costs.”

In the case of *English v. Blooms and the London Passenger Transport Board* (4), although the actions were consolidated, there was a special order as to how the costs were to be borne by the parties, and I do not think this case can assist me in the instant taxation.

The case of *The Bosworth* (No. 2) (5) is also in my view not in point. Not only each set of plaintiffs there was represented by separate solicitors and counsel, but there was also a special order on costs made by the learned trial judge which was the subject matter of the appeal and which the Court of Appeal was considering in that case. I do not think the opinions expressed by the learned Lord Justices in that case tend to support counsel for the plaintiff.

I am therefore satisfied in my mind that there should be apportionment of costs in these cases. I am further of the opinion that as there was consolidation of the cases for the purposes of the second defendant’s application the plaintiff ought to have filed one consolidated bill of costs in the case in which the consolidated motion was argued, and not nine separate bills as he has done, and I invite learned counsel’s attention to my ruling in Civil Appeal No. 59 of 1959 – *Dorio L. Vincenzini v. The Regional Commissioner of Income Tax* (6). But since this point has not been taken up by the other side I do not propose to disturb the present bills. Nevertheless in assessing the instructions fee in the main bill I shall bear in mind the extra costs incurred in drawing and filing the other eight bills which in my view were unjustifiably incurred and which will have to be borne by the second defendant now on the basis of nine separate bills.

Following the decision on taxation appeal in *Roshanali Nazerali and Another v. Comr. Income Tax* (7), it seems to me that in cases where apportionment of costs is called for the correct practice would be

to allow main instructions fee in “the main case” and nominal instructions fee in the other or others. But in assessing the main instructions fee in the instant matter I think proper weight should be given to the interest of the parties in all the cases as a whole.

It is not in dispute that the basic instructions fee on the second defendant's application is Shs. 50/-. The application was however hotly contested and argued for one full day and authorities were cited on both sides. I have considered the arguments before the court and the ruling of the learned judge, and am satisfied that the application was not an easy one.

Bearing in mind however what I have said before in regard to the extra costs incurred in filing separate bills in these cases I think I should allow an instructions fee of Shs. 500/- in the main bill and the basic instructions fee of Shs. 50/- in the other eight bills which I consider to be fair and reasonable on a party and party basis. Accordingly I allow item 2 as claimed in the bill in this case, namely C.C. 989 of 1965, and the instructions fee in the other eight bills will be reduced by Shs. 450/- in each case.

I allow Shs. 63/- for attendance in this bill. There would be no attendance allowed in respect of the other bills.

In the result the plaintiff's bill dated December 31, 1965, in respect of the second defendant's application, against the second defendant is taxed in the sum of Shs. 1,055/50.

The plaintiff's bill in the other eight cases is taxed at Shs. 173/50 in each case, and the other files would be endorsed accordingly.

Order for an instructions fee of Shs. 500/- in the main bill, and a basic instructions fee of Shs. 50/- in the other eight bills.

For the plaintiff:

D. N. Khanna

For the second defendant:

W. S. Deverell

Republic v Mansukhlal Datani
[1966] 1 EA 354 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	613/1966
Case Number:	14 July 1966
Before:	Sir John Ainley CJ and Miller J
Sourced by:	LawAfrica

[1] *Criminal law – Practice – Costs and compensation against the State – Whether charge frivolous or vexatious – Meaning of ‘frivolous’ – Withdrawal of charge amounting to acquittal – Whether costs can be awarded against the State – Criminal Procedure Code (Cap. 75), s. 171 and s. 173 (K.).*

Editor's Summary

The appellant upon entering Kenya from Uganda was asked to report to the Kisumu Police Station which he did, but on arrival there he was locked in a cell despite the fact that he had produced his passport showing an endorsement of a permanent resident's permit. He was later charged with unlawfully entering Kenya but this charge was subsequently withdrawn under s. 204 of the Penal Code. Upon the application for compensation and costs under s. 173 of the Criminal Procedure Code, the trial magistrate found that the prosecution was both vexatious and frivolous and ordered the police to pay costs amounting to Shs. 1,000/- and compensation of a further Shs. 1,000/- for the trouble, expense and loss of salary. The Republic appealed against this order on the ground that the proceedings were not frivolous.

Held –

- (i) compensation but not costs may be awarded against the State: *Attorney General v. Mohamed Anwa Sandhu and Siri Ram Kaura*, (1948) 23 K.L.R. (Part I) 29, followed;
- (ii) the charge was not vexatious but frivolous in the sense of being “futile” and “silly” and the award of compensation was fully justified.

Appeal allowed in part. Order for costs set aside.

Cases referred to in judgment:

- (1) *A.-G. v. Mohamed Anwa Sandhu and Siri Ram Kaura* (1948), 23 K.L.R. (Part I) 29.
- (2) *Republic v. Desmond Dunn*, [1965] E.A. 567 (K.).

Judgment

Sir John Ainley CJ, read the following judgment of the court: In this case this court is called upon once more to interpret the confused jumble of sections which occurs in the Criminal Procedure Code under the heading “Costs and Compensation”.

We rely for our knowledge of the facts upon a statement made in the court below by the respondent’s counsel. This statement of facts has never been seriously disputed.

The respondent, who is an Asian, arrived in Kisumu from Uganda very early in December last year.

His entry was perfectly legal, for he had been granted a permanent resident’s permit, and this was endorsed on his passport, which he carried. He was advised however to call at the Kisumu Police Station and to report his arrival. This was sound if over-cautious advice, and the respondent followed it. He called at the police station on December 2, and showed the police his passport with the endorsement mentioned. The police locked him up in a cell and prevented him from communicating with his relatives in Kisumu.

Presumably his relatives knew that he had gone to the police station, and later that day an advocate succeeded in contacting the officer in charge of the police station. This officer refused to release the respondent unless the advocate stood bail for him. The advocate did so, and the respondent was released. On the morning of December 3 the respondent surrendered to his bail at the police station. He was accompanied by the advocate who drew the attention of the police to the endorsement. He was then taken to the magistrates’ court and placed in the court cells.

A charge, signed by the officer in charge of the Kisumu police station, that the respondent had unlawfully entered Kenya was presented to the court. There was no foundation for that charge at all.

When later that morning the respondent appeared before the court his advocate declared that he would contend that the charge was frivolous and vexatious. The prosecuting officer asked for a two weeks’ adjournment which was granted.

During those two weeks counsel for the appellant tells us, and of course we accept what he tells us, the Kisumu police consulted the Law Officers about the matter.

When on December 17 the respondent once more appeared before the court the case for the Republic

was in the hands of a Chief Inspector of Police.

He first sought to withdraw under s. 87 (*a*) of the Criminal Procedure Code, but when objection was taken by the respondent's counsel he very properly asked to withdraw under s. 204 of the Code.

The learned magistrate dealt with the matter by saying that he refused to admit the charge, and he discharged the respondent. We are not concerned with the technical rights and wrongs. of all that. We think it can be said that the case was dismissed.

Learned counsel for the respondent then said – “I apply under s. 173 of the Criminal Procedure Code for an order for compensation and costs on the grounds that the charge is frivolous and vexatious”. He then stated the facts and argued the matter.

In reply the Chief Inspector mildly excused the behaviour of the police. He said that the officer responsible might have been confused by an expired entry permit on the passport. He did not say that this was the reason for charging the respondent. He added, “I agree it is a case for compensation. The advocate’s fees amount to Shs. 1,000/-. Loss of salary Shs. 500/-”.

The learned Deputy Public Prosecutor criticised that admission.

We do not raise questions of estoppel in this case but we do point out that the courts are placed in difficulties when the representative of the Republic in one court resiles from the admissions made by another representative of the Republic in another court.

Be all that as it may we think that the Chief Inspector concerned who very probably knew as much about the affair as anyone, may well have been very wise to take the line “the less said the soonest mended” and to decline to resist a reasonable award to a man who had obviously been wronged.

However the learned magistrate found that the prosecution was both vexatious and frivolous and his order read as follows:

“I order that the Kenya Police do pay this accused costs amounting to Shs. 1,000/- being his advocate’s fees and compensation of a further Shs. 1,000/- for the trouble, expense and loss of salary to which he has been put.”

We will now set out s. 173 of the Criminal Procedure Code. It reads:

“If on the dismissal of any case any court shall be of the opinion that the charge was frivolous or vexatious, such court may order the complainant to pay to the accused person a reasonable sum as compensation for the trouble and expense to which such person may have been put by reason of such charge in addition to his costs.”

Now it is to our minds really beyond question that both the learned counsel who appeared for the respondent and the learned magistrate himself took the words of this section at their face value and supposed that it was open to the court in a case where the Republic is the prosecutor to make an award of costs.

If s. 173 stood alone no doubt that is what it would mean. But as it is merely a part of a scheme of costs and compensation in criminal cases the words “in addition to his costs” constitute a trap into which not only the unwary may step. The trap was pointed out by Bourke, J., in an elaborate judgment in the case of *A.-G. v. Mohamed Anwa Sandhu and Siri Ram Kaura* (1). He said ((1948) 23 K.L.R. (Part I) at p. 30):

“In my opinion the words ‘in addition to costs’ appearing in s. 173 were intended not to be read as a substantive and separate provision for the award of costs but were added for the sake of clarity, and mean that where an accused person is awarded compensation for his trouble and expense such order does not preclude the obtaining of costs also under the section providing for the award of costs, namely s. 171; and such costs could only be costs

against a private prosecutor. In other words the accused may have an order for compensation under s. 173 as well as an order for costs if he be so entitled apart from that section.”

Close reasoning led up to that conclusion. We do not intend to set out the remainder of the judgment or to attempt a shortened version of it. It is sufficient to say that we agree with the reasoning and that the decision has never been questioned since it was given nineteen years ago. Since that decision it has been regarded as the law that compensation, but not costs, may be awarded against the state.

If it were argued that there is no warrant in common sense or law for splitting “a reasonable sum as compensation” into recompense for costs and recompense for trouble and expense we would be inclined to agree. We can only say that the legislature makes this division and that throughout the Criminal Procedure Code and the Penal Code one finds that the two concepts, costs and compensation, are kept separate.

If it is argued that the learned magistrate has simply awarded the costs as part of the trouble and expense the answer is that with apparent deliberation he has kept the two matters separate.

We are bound to set aside this order for costs, and we do so. The award of compensation on the other hand we consider to be fully justified. We are not satisfied that these proceedings were vexatious. Cross examination of these officers who twice confined the respondent in a cell might possibly have revealed a will to harass the subject unduly. We do not know. The Chief Inspector who admitted that it was a case for compensation steered the State clear of matters of that kind by his admission. But we are perfectly satisfied that these proceedings were frivolous.

Criticism has been made of the phrases used by the learned magistrate when making his finding that the proceedings were frivolous, but we see no misdirection in those phrases and that apart we think that no court properly directed could have failed to find that these proceedings were frivolous.

The learned Deputy Public Prosecutor has referred to phrases used by this court in the case of *Republic v. Desmond Dunn* (2) and has sought to distinguish thoughtless and therefore frivolous behaviour, from mistaken behaviour which follows profound thought, and cannot therefore be called frivolous. It is not unfair to counsel for the appellant to say that his argument is really this that the police officers concerned in this case were men so devoid of intellect that nothing in particular happened however hard they thought. “Parturient montes nascetur ridiculus mus”. But, with respect, this will not do. There is not the slightest evidence that the policemen concerned fell below average intelligence, and this charge was preferred by the Officer in Charge of Kisumu Police Station, an officer who was, it is fair to assume, of some seniority and experience. But even if the explanation of this affair is stupidity on the part of the policeman or policemen concerned the matter is yet covered by one at least of the phrases used by this court in *Dunn’s* case (2) and it is certainly covered by two of the synonyms in the Shorter Oxford Dictionary, “futile”, and “silly”.

We are both satisfied that these proceedings could properly be described as frivolous and that the award of Shs. 1,000/- as compensation was proper. We make no order in revision therefore.

Appeal allowed in part. Order for costs set aside.

For the appellant:

Subodh Inamdar, Nairobi

K. C. Brookes (Deputy Public Prosecutor, Kenya)

For the Republic:
The Attorney General, Kenya
Subodh Inamdar

E.A.R. and H. Administration (General Manager) v Arusha Town Council
[1966] 1 EA 358 (CAN)

Division: Court of Appeal at Nairobi
Date of judgment: 16 August 1966
Case Number: 20/1966
Before: Sir Clement de Lestang Ag P, Spry Ag VP and Law JA
Sourced by: LawAfrica
Appeal from: The High Court of Tanzania – Bannerman, J.

[1] *Rates – Unimproved value – Whether planning proposals amount to a restriction on the use of the land – Whether willing purchaser and vendor would take proposals into account – Local Government (Rating) Ordinance (Cap. 317), s. 3 (T.).*

[2] *Rates – Assessment – Application of “profits method”.*

Editor’s Summary

The appellant had objected to the unimproved value for rating purposes of railway land in Arusha on three grounds one of which was that the valuer had erred in valuing it by comparing it with neighbouring land of a different character. The only questions before the Court of Appeal were what should be the method of valuation and whether any restriction on the user of the land should be taken into account. The only restrictions that could apply were the “Arusha Planning Proposals”, but these had not been approved although it was alleged that they had in practice been followed. The grounds of appeal were firstly that the proposals constituted a restriction; secondly and in the alternative, if not a restriction, they should have been taken into account as matters affecting a potential purchaser and thirdly, the “profits method” not the “comparative method” of assessment should have been used.

Held –

- (i) a “restriction” as used in the definition of “unimproved value of land” in the Local Government (Rating) Ordinance (Cap. 317) should be interpreted widely to include planning proposals in a proposed scheme but since there was no evidence as to how the proposals were followed this ground of appeal failed;
- (ii) the proposals in the plan would have been taken into account by a potential purchaser and a potential vendor in reduction of the price and the value ought to have taken them into account;
- (iii) land restricted to use for railway purposes was in a class of its own and could not be assessed by

the comparative method for lack of comparable land;

- (iv) the value to be assessed was an inexact matter of fact and the circumstances of a particular case might demand a combination of methods of valuation but in this case the valuer should have given weight to the profitability of the existing railway as part of a railway system in reaching the unimproved value.

[Editorial Note: The material parts of the judgment of Bannerman, J., dealing with the size of the rateable unit and a discussion of the cases where the profits method and the comparative method have been used, are set out on p. 365, et seq., post.]

Appeal allowed. Remitted to Valuation Court for rehearing if parties failed to agree a valuation.

Cases referred to in judgment:

- (1) *Stephen v. Federal Commissioner of Land Tax* (1930), 45 C.L.R. 122.

(2) *Wunderlich Ltd. v. Valuer General* (unreported).

(3) *Hutt River Board* (unreported).

The following judgments were read.

Judgment

Spry Ag VP: The General Manager of East African Railways and Harbours Administration lodged a notice of objection under s. 8 of the Local Government (Rating) Ordinance (Cap. 317) in respect of the entries relating to railway property in Arusha made in the 1964 valuation roll. A valuation court was accordingly held by the senior resident magistrate, Arusha.

The objection was based on three grounds: first, it was alleged that the valuer who prepared the roll and whose duty was to discover the unimproved value of the land, appeared to have taken into account buildings on the land; secondly, it was claimed that the railway land should have been treated as a single unit, whereas the valuer had treated it as eight units; thirdly, it was submitted that the valuer had erred in valuing the land on the basis of comparison with neighbouring land and it was argued that that basis was inappropriate because the land in question could only be used for railway purposes.

The learned senior resident magistrate does not appear to have dealt expressly with the first of these issues but that is not important as it appears to be common ground between the parties that the existence of buildings on the land cannot be taken into account in determining the unimproved value of the land.

He decided the second and third issues in favour of the appellant. The respondent, to which I shall refer as the Town Council, appealed to the High Court and was successful on the third issue but failed on the second. The appellant now appeals against the judgment of the High Court on the third issue. There has been no appeal on the second issue and it is therefore unnecessary for us to consider it. We are solely concerned with the two inter-related questions, what should be the method of valuation and whether it should take into account any restriction on the user of the land.

These questions turn largely on the meaning of the expression “unimproved value of land”.

The Local Government (Rating) Ordinance was first enacted in 1952, when the definition of “unimproved value of land” was as follows:

“ ‘unimproved value of land’ means the sum which the unrestricted freehold interest in such land together with possession thereto, if unencumbered by any mortgage or any charge thereon, might reasonably be expected to realise if brought at the time of valuation to voluntary sale on such reasonable terms and conditions as a bona fide seller might be expected to impose if the improvements, if any, thereon or appertaining thereto had not been made. The unimproved value of land shall include any value due to any licence, wayleave, easement, royalty, privilege or concession attached to the land for the time being;”

The definition appears to have been derived from Australian legislation but unfortunately we have not the available material to say from what particular statute. So far as we are aware, the Australian definitions did not include the word “unrestricted”, and in *Stephen v. Federal Commissioner of Land Tax* (1), it was held that the fee simple to be valued was the estate subject to the conditions and restrictions in the grant. It may well be for this reason that the Tanganyika legislature thought fit to include the word “unrestricted”.

In 1961, the Local Government (Rating) Ordinance was amended by the deletion from the definition of “unimproved value” of the word “unrestricted” and the insertion of the words “and having regard to any restrictions on or affecting the land imposed by the local authority, or town planning authority, or by or under any by-laws”. This may well have sprung from Australian and New Zealand cases (*Wunderlich Ltd. v. The Valuer-General* (2) and the *Hutt River Board* case (3) were cited to us) in which it was held that a valuer determining the unimproved value of land ought to take into account town and country restrictions on user, as being matters which would affect the price a potential purchaser would pay.

The definition of “unimproved value of land” in the Local Government (Rating) Ordinance now reads as follows:

“ ‘unimproved value of land’ means the sum which a Government lease for an unexpired term of nine-nine years of such land together with possession thereto, if unencumbered by any mortgage or any charge thereon, might reasonably be expected to realise if brought at the time of valuation to voluntary sale on such reasonable terms and conditions as a bona fide seller might be expected to impose if the improvements, if any, thereon or appertaining thereto had not been made, and having regard to any restrictions on or affecting the land imposed by the local authority, or town planning authority, or by or under any bye-laws. The unimproved value of land shall include any value due to any licence, wayleave, easement, royalty, privilege or concession attached to the land for the time being;”

It was because of the 1961 amendment that the present proceedings arose. Prior to the amendment, it was clear that no restrictions on user of any kind could be taken into account by the valuer and the main question in issue in these proceedings was whether there were in existence at the relevant date restrictions of the kind to which the amended definition required the valuer to have regard.

The Town Development Control Ordinance (Cap. 103), which in 1956 was repealed, with saving provisions, by the Town and Country Planning Ordinance (Cap. 378), had been applied to Arusha but no planning scheme for Arusha had ever been approved or gazetted, although a plan, which is entitled “Arusha Planning Proposals” was prepared by the Department of Town Planning as long ago as 1955. Arusha had not been declared to be a planning area under the Town and Country Planning Ordinance at the date of the hearing in the High Court, although it was so declared shortly afterwards, by Government Notice No. 94 of 1966, and under the saving provisions of s. 81 of that Ordinance it was with the provisions of the earlier ordinance that the High Court was concerned.

The plan to which I have referred showed part of the town of Arusha divided into zones according to the use of the land which it was proposed to allow, the land with which this appeal is concerned being shown as “Railway Reserve”.

The learned senior resident magistrate held that although the plan was only a draft, it was a proposal that a prudent buyer would have to take into account and that there was therefore a restriction affecting the land and imposed by the town planning authority. He held that the comparative method of valuation could not be employed because, once the existence of the restriction was recognised, there was no other property with which railway land could usefully be compared. He thought that a profits basis could and should be used in the valuation and, on figures produced by the appellant and not seriously challenged by the Town Council, decided that a nil valuation must result.

On appeal to the High Court, the learned judge held that since, under s. 24(1) of the Town Development (Control) Ordinance, a scheme “shall not have

effect” until duly approved, the plan was not a restriction imposed by the town planning authorities and any restriction which the local authority might seek to apply based on it would be ultra vires. Those proposals embodied in the plan were, therefore, not a restriction within the meaning of the definition of “unimproved value of land”. In consequence of that finding, the learned judge held that, the use of the land being unrestricted, the comparative method of valuation was the correct method to apply and he remitted the proceedings to the valuation court to determine the value of the land on that basis.

The main grounds of appeal to this court were three: first, it was argued that the plan, having in fact been used by the Town Council, ought to have been held by the learned judge to constitute a restriction; secondly and in the alternative, it was submitted that even if the plan did not constitute a restriction, the proposals in it were nevertheless a factor which a potential purchaser would have to take into account and one which ought therefore to have been taken into account by the valuer and that the learned judge had erred in not so directing; and, thirdly, if the appellant succeeded on either of the first two grounds, that the comparative method of valuation was inappropriate and the “profits method” ought to be employed. It was conceded that if the plan ought to be ignored, the comparative method of valuation was the best.

As regards the first ground of appeal counsel for the appellant, submitted that there was a de facto restriction, whether or not the plan had any effect in law. He submitted that the development of Arusha over the last ten years has been governed by the plan and he drew attention to r. 5(4)(h) of the Township (Building) Rules (Supp. 59, Cap. 101, p. 51), which empowers the Town Council to withhold its approval from building plans which “would contravene or render abortive any Town Planning Scheme or proposed Town Planning Scheme”.

Counsel for the respondent submitted that the question was not whether the Town Council could impose restrictions but whether it had in fact done so in relation to the particular land with which we are concerned. It appeared that no application had been made for approval of building plans in respect of the railway land and accordingly no “restriction” had been imposed. Furthermore, counsel for the respondent submitted that there was no evidence to show that the plan had in fact been used as the basis of any restriction on the use of any land.

I do not consider that the word “restriction” should be given too narrow a meaning: whether or not there is a restriction, provided it is not unlawful, is, I think, a matter of fact rather than of law.

I am of the opinion that if a local authority were regularly to exercise the power conferred by r. 5(4)(h) of the Township (Building) Rules so as to prevent a proposed scheme being rendered abortive, that practice would constitute a restriction affecting the land comprised in the scheme. It may well be, indeed I think it very likely, that such a practice was followed by the Town Council but I am not satisfied that it has been proved by evidence. This is a matter which could have been proved without difficulty and it is not one where any presumption can be relied on. I would therefore reject the first ground of appeal.

The second ground of appeal was based on the fact that the unimproved value of land is the price which it might be expected to realise on a voluntary sale, and counsel for the appellant argued that a valuer must put himself into the shoes of a potential purchaser. I think that is too one-sided an approach. The valuer must, I think, look at the matter from both sides, from that of the potential vendor and that of the potential purchaser, and then decide at what price they are likely to come to terms.

Counsel for the respondent argued that the plan would have little effect on the value of land in Arusha, because if the proposals were adopted as a scheme any

person injuriously affected would be entitled to compensation. He was prepared to concede that they might result in fewer persons being interested in buying, but he thought they would have little effect on the value of the land. I am not persuaded by that argument. A purchaser would be most unlikely to obtain approval of building plans which did not accord with the zoning on the plan and so would probably find himself unable to use the land for any purpose inconsistent with it. Even if he did obtain such approval, I think it is very doubtful whether he would be able to recover compensation for any expenditure rendered abortive by the subsequent coming into operation of a scheme corresponding with proposals of which he had been aware when he incurred the expenditure. If he did not obtain approval, the proposals would injuriously affect him, but such right to compensation, if any, as he might have would not accrue until the approval of a scheme, an event which might lie far in the future, and if he had been precluded from using the land as he intended, he would probably have no right to compensation. In these circumstances, I think a purchaser would be most ill-advised to pay more for land the subject of planning proposals than the land was likely to be worth if the proposals were to be included in an approved scheme. It would follow that, unless there was any real likelihood of planning proposals being changed, they would have practically the same effect on the value of land as an approved scheme. It would therefore allow the second ground of appeal and hold that the learned judge should have held that the proposals embodied in the plan were a factor which the person who prepared the valuation roll ought to have taken into account and given full weight.

As regards the third ground of appeal, if it is once accepted that the use of the land is, or is to be regarded as, restricted to railway purposes, I cannot see that a comparative method of valuation can be employed. The comparative method consists simply of deducing the market value of a property from actual prices realised on the sales of comparable properties. Its usefulness as a system varies according to the number of sales that may properly be considered, the similarity of the properties that were sold to that to be valued and the nearness in time of the sales to the valuation. But before it can be applied at all, the properties must be comparable. When it is the unimproved value of land that has to be determined, the valuer must consider the best use to which the land could be put, and in that connection, any restriction on user will be most relevant. For example, prices realised by land restricted to residential user will be of no material assistance in determining the value of land available for industrial development. Looked at from this point of view, it seems to me that land restricted to use for railway purposes is in a class of its own.

Counsel for the respondent argued that the comparative method could be applied, even though the user of the land were held to be restricted. He submitted that, having regard to the situation of the land, its highest potential use was for railway purposes. The land to be valued had to be regarded as though it were undeveloped but the adjoining land should be looked at in its actual state of development. Counsel for the respondent argued that for this purpose the railway land outside the area of Arusha township should be treated as adjacent to the railway land within the township and he further submitted that for the purpose of assessing the value, the appellant himself could be regarded as a potential purchaser. If I understood him aright, counsel for the respondent based this last proposition on the argument that the appellant as vendor could reasonably expect to get the price which he himself would willingly pay if he were acquiring the land. I think, with respect, that this argument is too artificial, although it must, of course, be conceded that the assessment of the unimproved value of land which was in fact developed years ago is inevitably artificial. I accept that one must look at the land to be valued as if it were undeveloped and at the neighbouring land in its presently developed state but I think that in doing

so one must treat the railway property as a whole. The potential purchaser would then be a potential purchaser, for the purpose of constructing a railway, of the land which is now the site of the track from Arusha to Tanga, with all ancillary areas reserved for stations, offices, godowns, sidings, etc., that being, apparently, accepted by counsel as the smallest workable unit of the present East African Railways and Harbours to include the Arusha land.

The learned judge said that had he been convinced that there was a restriction affecting the land, he would not have agreed that the comparative method of valuation was necessarily the only or the correct basis that should be used but that having come to the conclusion that any restrictions ought to be ignored, he was satisfied that the comparative method ought to be employed. In considering the alternative, however, he had referred to the “profits method” as having been used both in England and Australia. The third ground of appeal was accordingly a submission that the learned judge had erred in holding that the comparative method of valuation should be used “instead of the ‘Profits method’ (the ascertainment of the land’s value with reference to its worth in the trade to which it will or must be used)”.

Counsel for the respondent supplemented his argument that the comparative method was appropriate and proper by a submission that the profits method cannot be used to determine the unimproved value of land. He submitted that “profits method” is a term of art, limited to a method of valuation used in England to determine the annual rental value of land and improvements. In applying that method, the unimproved value of the land is one of the factors used in arriving at the annual rental value: therefore, in counsel for the respondent’s argument, it would be impossible to use a system which necessitates knowing the unimproved capital value in circumstances where that is the very fact it is sought to discover. For this reason, the third ground of appeal ought to be rejected.

Counsel for the appellant, on the other hand, argued that the term “profits method” is a generic term which covers all methods of valuation other than the comparative.

I do not, with respect, think it is necessary to consider whether the words “profit method” constitute a term of art in East Africa, because it is clear that neither the learned judge, reading as a whole the relevant parts of his judgment, nor the appellant, in view of the words in parentheses in the third ground of appeal, were using them as such.

Counsel for the respondent further argued that what is known as the residual method of valuation is also inappropriate. Whereas the profits method is based on actual profits being made, the residual method is based on notional profits if the land were put to its best use but based on the actual profits of neighbouring properties. Counsel for the respondent argued that this method was inappropriate, as there are no comparable undertakings the profits of which could be taken into account, while to attempt to estimate the profits that a newly built railway might earn would be so speculative as to be completely unreal.

Counsel for the respondent criticised the valuation that had been made on behalf of the appellant on the ground that it had some of the elements of the profits method mixed with elements of the residual: he pointed out that the actual profits of the existing railway had been related to the estimated cost of a notional new railway and he argued that this was unsound and unreal.

Counsel for the appellant did not attempt to defend the appellant’s valuation, even though it had not seriously been attacked in the lower court. He was quite prepared to abandon it and was content for the matter to be remitted for revaluation of the land by a government valuer, provided it was recognised that the

that the valuation must be based on what the land is worth for purely railway purposes.

As I have said, I am satisfied that the land cannot be valued on the comparative basis, for lack of any comparable land. I accept the general proposition that the basis of valuation must be the capacity of the land to earn profits when used exclusively for railway purposes.

Having said that, I do not think we should lay down how the valuer is to carry out his task. There are various methods used by valuers but these are merely professional aids. Value is a matter of fact, but one which can never exactly be determined and the more unusual the nature or permitted use of land, the more difficult it is for an estimate even to approximate to the truth. The circumstances of a particular case may well demand some modification of a recognised method. It may be practicable to use two methods, one as a check on the other. It may even be possible and necessary to combine features of different methods.

I am not overlooking the cases cited to us by learned counsel, in which courts in England and Australia have directed that particular methods of valuation be used, but those are only authoritative in relation to the particular types of property and to valuations for the particular purposes with which the courts were then dealing. I do not think any is of great assistance here.

Without in any way fettering the discretion of the valuer who may be called on to undertake the new valuation, I would express the opinion that weight must be given to the profitability of the existing railway because that is a matter of fact. He is not, of course, precluded from considering the hypothetical profits that might be made by other operators using the land for a notional railway. I think, however, that in assessing the potential profitability of the land, it must be considered as part of a railway system and not in isolation. Such a system might be the whole system now operated by the appellant or a smaller unit such as a line from Arusha to Tanga.

For the reasons I have given, I would allow this appeal and set aside the judgment and order of the High Court. I would remit the proceedings to the valuation court, provided the parties are not able on the basis of the findings of this court to reach agreement, to hear the objection by the appellant de novo.

As regards costs, no order was made in the valuation court but, in the High Court, the learned judge allowed the respondents their costs both in that court and the lower court, with a certificate for two counsel. With respect, I do not think he had power to award costs in the valuation court, as I do not think that court itself has power to award costs. Although the valuation court is presided over by a resident magistrate, it is a distinct body with statutory powers set out in s. 9 of the Local Government (Rating) Ordinance. Those powers do not include the power to award costs. I would award the appellant his costs in this court and in the High Court.

Sir Clement De Lestang Ag P: I have had the advantage of reading in advance the judgment of Spry, Ag. V.-P., with which I entirely agree. There will be an order in the terms proposed by him.

Law JA: I also agree.

Appeal allowed. Remitted to Valuation Court for rehearing if parties failed to agree a valuation.

For the appellant:

The Legal Secretary, E.A.C.S.O.

M. W. Christian and J. Maynard

For the respondent:

Reid and Edmonds, Arusha

P. A. Clarke

**Arusha Town Council v East African Common Services Organisation and
another**
[1966] 1 EA 365 (HCT)

Division:	High Court of Tanzania at Arusha
Date of judgment:	10 February 1966
Case Number:	4/1965
Before:	Bannerman J
Sourced by:	LawAfrica

[1] *Rates – Rateable unit – Question of fact that property one unit – No error or principle in so finding.*

[2] *Rates – Assessment – Application of “Comparative Method” – No assumption that this is the most appropriate method for public utility undertakings.*

Editor’s Summary

Appeal allowed. Case remitted to the Valuation Court for taking further evidence.

[**Editorial Note:** On appeal to the Court of Appeal the judgment and order of the High Court was set aside: see p. 358, ante.]

Cases referred to in judgment:

- (1) *North Eastern Ry. Co. v. Guardians of York Union*, [1900] 1 Q.B. 733; [1956] 2 All E.R. 101.
- (2) *Gilbert (Valuation Officer) v. S. Hickinbottom & Sons Ltd.*, [1956] 2 Q.B. 40.
- (3) *Municipality of Mombasa v. Nyali Ltd.*, [1963] E.A. 330 (C.A.).
- (4) *Toohey’s Ltd. v. Valuer General*, [1925] A.C. 439.
- (5) *Gollan v. Randwick Municipal Council*, [1961] A.C. 82; [1960] 3 All E.R. 449.
- (6) *Duncan and Others v. The Federal Commissioner of Land Tax* (1915), 19 C.L.R. 551.
- (7) *Rymill v. Federal Commissioner of Taxation* (Supreme Court, South Australia, January 22, 1919) (unreported).
- (8) *Barking Rating Authority v. Central Electricity Board*, [1940] 2 K.B. 495; [1940] 3 All E.R. 477.
- (9) *Robinson Brothers (Brewers) Ltd. v. Durham County Assessment Committee*, [1938] A.C. 321.

- (10) *Railway Assessment Authority v. Southern Ry. Co.*, [1936] 1 All E.R. 26.
- (11) *British Transport Commission v. Hingley*, [1961] 2 Q.B. 16; [1961] 1 All E.R. 837.
- (12) *Dymock's Book Arcade Ltd. v. Federal High Commissioner of Taxation* (1937) (unreported).
- (13) *Spencer v. The Commonwealth* (unreported).

Judgment

Bannerman J, read the following judgment: This is an appeal by the Arusha Town Council from the decision of the senior resident magistrate, sitting as a valuation court by virtue of the provision of s. 9 of the Local Government (Rating) Ordinance (Cap. 317) in respect of the valuation of railway property (hereinafter referred to as the property) owned within the township of Arusha by the respondent, the General Manager of the East African Railways and Harbours Administration, and used for the purposes of railway services a utility undertaking.

The case arose out of the preparation of the 1964 Valuation Roll for the Arusha Township under s. 4 of Cap. 317, and the valuer appointed by the appellants to

prepare the Draft Valuation Roll was a Mr. Wood a valuation officer employed in the services of the Government of Tanzania. Under s. 6 of Cap. 317, the valuer had to show in the Draft Valuation Roll, inter alia, the “unimproved value of the land” upon which valuation the rate to be paid by the owner was to be principally assessed and levied by the local authority in terms of s. 14 of Cap. 317. The property as shown in Exhibits 1 and 2, was originally divided by the valuer into eight separate units Nos. 1243, 1244, 1245, 1246, 1248, 1261, 1436 and 1446, and the units were given different valuations accordingly. It was subsequently conceded by the valuer and accepted by the appellants that the divisions should be reduced to five, the units into which the property is divided by the operational parts occupied by the tracks which have been exempted from rating by Gazette Notice No. 616 of 1963.

The respondent on February 8, 1965, in accordance with s. 8 (3) of Cap. 317, gave notice of his objection to the valuation in respect of each of the eight units separately valued, the grounds of objection in each case being that “This area should be incorporated with the other railway areas as one entity in the valuation roll. The valuation is excessive, incorrect and bad in law”.

The valuation court after enquiry into the merits of the objections upheld them, deciding that the valuation of the whole property should be nil, and it is from that decision that this appeal has been made to this court on the following grounds:

- “(i) That the court was wrong in fact in stating that ‘the present 1964 valuer’, i.e. the Valuer appointed under the Local Government (Rating) Ordinance (Cap. 317) (hereinafter referred to as ‘the Ordinance’) ‘was Mr. Wood of the Arusha Town Council’, and wrong in law in holding that ‘The Valuers of Arusha are estopped from denying that they used this plan with regard to the Railways’, insofar as such estoppel has been applied against the appellant.
- (ii) That the court erred in law in holding that the appellant is estopped from pleading that the duty of the valuer is to perform his duty strictly in accordance with the provision of the Ordinance and in particular s. 6 thereof.
- (iii) That the court erred in law in holding that ‘Planning Proposals’ drawn up by the Government Planning Officer, but not approved under the Town Planning Ordinance (Cap. 378), imposed a restriction on the land for the purpose of the definition of ‘unimproved value of land’ in s. 3 of the Ordinance.
- (iv) That the court erred in law in taking into account what a prudent buyer might take into account, instead of restricting its considerations to the effect, if any, of ‘such reasonable terms and conditions as a bona fide seller might be expected to impose’ and of restrictions imposed by the Local Authority, Town Planning Authority or Bye-laws, as required by the Ordinance.
- (v) That the court erred in law in holding that the method of assessment submitted by the respondents, and described as the ‘profits method’ is the correct method of valuation for railway owned land in Tanzania.
- (vi) That the court erred in law in holding that parcels of land separated by other land exempt from valuation should be treated as one unit for rating purposes.
- (vii) That the court, in deciding that, notwithstanding the evidence adduced by the appellant, the valuations in question as set out in the Draft Valuation Roll for Arusha Township whereof a copy excerpt is annexed hereto (marked annexure ‘A’), should be reduced

to nil, instead of being increased in accordance with such evidence, acted contrary to the weight of the evidence presented to it.”

[His Lordship dealt with grounds (i) and (ii), and continued]: Counsel for the appellants has argued in ground (vi) that the court below erred in law in holding that the property should be treated as one unit. The appellants in this case have relied on the fact that the land is divided into five sections by the railway lines or tracks in asking the court to hold that the land should be valued as five separate units for rating purposes. It was argued that each of the units is capable of being valued as either for industrial, commercial or residential purposes and therefore different valuations should be placed on the various units. In *North Eastern Ry. Co. v. Guardians of York Union* (1) (a case of rating concerning railway property consisting of running line, sidings, station, sheds, shops, platform, warehouses, yard, etc., in a parish) it was held that “The mere fact that the different portions of one undivided hereditament are capable of commanding rents if let to different occupiers does not impose any obligation upon the rating authority to assess and rate the different portions separately. Whether for rating purposes a particular area of land is to be treated as one hereditament or as more than one is a question of fact”.

In *Gilbert (Valuation Officer) v. S. Hickinbottom & Sons Ltd.* (2), ratepayers owned and occupied premises on opposite sides of a public road, on the one side a large mechanised bakery and on the other side a depot used for the repair and maintenance of the delivery vans and of the machinery in the bakery, thus being essential to the efficient working of the bakery itself and the question for determination was whether the two premises were separate hereditaments for the rating purposes or only one hereditament. Denning, L.J., said ([1956] 2 Q.B. at p. 49):

“Thirdly, take the case where two properties are separated by a public highway, the surface of which is vested in the highway authority and the soil is vested in the occupier of the two properties. In that case the position in general seems to me to be the same as if the two properties were separated by a canal, a railway or a dwelling-house occupied by somebody else. They are normally to be treated as two separate hereditaments for rating purposes. This was certainly assumed to be so in the fifth of the five rating cases (*Blunt v. West Derby Assessment Committee*). It was assumed that the properties on either side of the road should be separately rated unless they could be held to be ‘contiguous’ within s. 3 (3) of the 1928 Act; and, on this point of ‘contiguous or not’, despite the admission made by Mr. Wilfrid Lewis, the court clearly indicated their view that in the ordinary way houses on opposite sides of the road were not contiguous. I must say that I agree with that view. The fact that the one occupier owns the subsoil of the road does not make them contiguous any more than if he owned the minerals underneath. It has nothing to do with the occupation.

Our present case comes within the third general rule. The two properties ought, therefore, *prima facie*, to be rated as two separate hereditaments. But this third rule is not inflexible. There are exceptional cases where two properties, separated by a road, may be treated as one single hereditament for rating purposes. That may happen when a nobleman’s park, or a farm (when agricultural land was rated), or a golf course, is bisected by a public road. In such cases the two properties on either side of the road are so essentially one whole – by which I mean, so essential in use the one to another – that they should be regarded as one single hereditament.

Where does this case come? Within the third general rule of the exception to it? This is a question of degree and therefore of fact which if for the tribunal of fact, so long as it properly directs itself on the matter. Three cases were quoted to us where the tribunal of fact held that two properties

on opposite sides of the road were two separate hereditaments although used as parts of one single undertaking. These cases are *Glasgow University v. Assessor for Glasgow*, *Bellamy v. Hinckley U.D.C.*, and *Spencer and Thurrock U.D.C. v. Thames Board Mills Ltd.* Those cases commend themselves to my mind; and I confess that I find it very difficult to distinguish our present case from those on the facts; but there must be some distinction because the chairman of the Lands Tribunal had those cases well in mind, and he had the advantage of a view, which we have not. We can only reverse his decision if it was one to which he could not reasonably come. I am not prepared to go so far and I would therefore dismiss the appeal.”

Morris, L.J., after referring to the judgment of Channell, J., in *North Eastern Ry. Co. v. York Union* (1) said:

“The decision in the present case fell to be made as a question of fact, but a question of law may nevertheless arise as to whether there was some erroneous approach or whether weight was given to any considerations which ought to have been disregarded. It was submitted that there was an erroneous approach in that attention was paid to the use to which the repair depot was put in connection with the repairs of the bakery plant (although such use did not form the major portion of the work done therein) was so essential to the efficient working of the bakery itself that, despite the separation of the two buildings by a public highway, they should in the circumstances of the case be treated as one hereditament. It was submitted, as set out in the notice of motion, ‘That the tribunal misdirected itself in holding that the functional connection for the purposes of the respondents’ business between the use of the said “repair depot” and the use of the said “bakery” was a relevant and decisive consideration in arriving at the conclusion that the said premises should be treated as one hereditament’. If, however, the consideration was a relevant and admissible one then the weight to be attached to it was a question for the tribunal. The problem which is raised becomes, therefore, one as to whether on the facts of this case regard could be had to the use to which premises are put. It was submitted that if premises are in the same occupation and if they are contiguous, or if they are within the same curtilage, then *prima facie* they are to be regarded as one hereditament; but that in such circumstances a distinct and separate user of some part of such premises may justify regarding that part as a separate hereditament. The case of the hotel at York station in the case cited was given as an example. But it was submitted that if premises which are in the same occupation are structurally and geographically separate and if they are capable of being separately let, then the use to which the premises are put must be entirely excluded from consideration and the premises must be held to be separate hereditaments.

I do not feel able to accept this approach I do not think that it is appropriate to lay down propositions of the above nature as being inevitably or invariably applicable. If, as I think, the decision as to whether premises form one hereditament is a question of fact, then I think that it is undesirable to prescribe some formula in words or to seek to define certain considerations as being relevant and to stipulate that others must be excluded. Parliament has not laid down a definition of a hereditament and difficulties might result if a rigid judicial definition were formulated. In the great majority of cases there will be no difficulty, after assessing all the considerations which apply according to the weight they command, in deciding whether premises comprise a hereditament. In the borderline cases where difficulty arises it is better to employ a common-sense assessment of the features of the case than to seek to have recourse to some standard formula.”

Parker, L.J., after considering various considerations upon which the question whether or not premises in one occupation fall to be entered in the valuation test as one or more hereditaments said:

“No doubt the most important of these other considerations is whether the premises form a geographical unit. Can they be ringed round on a map?

As Lord Keith said in *Glasgow University v. Assessor for Glasgow*: ‘In the ordinary case where derating issues are not involved the question whether separate buildings, or parts of buildings should be entered in the Roll as unum ovid falls to be decided primarily from the geographical standpoint’.

This test is so often decisive that it is a convenient starting point to the inquiry, but it is not decisive in all cases. Thus, though the premises may form a geographical unit, the manner in which different parts are used may justify the premises being treated as several hereditaments: cf. *North Eastern Ry. Co. v. York Union* (1), per Channell, J.

The appellant’s contention, however, is that though the functional test may justify treating a geographical unit as two hereditaments, it is wholly inapplicable where the premises occupied are geographically and structurally separate. There is no doubt, I think, that in the latter case little weight will ordinarily be given to any functional connection, but it is another thing to say that it is irrelevant. If, as is admitted, a functional connection is a relevant consideration when considering a geographical and structural unit, I fail to see why as a matter of law it cannot be considered at all when there are separate geographical and structural units. Each case must be considered on its particular facts, due weight being given to the degree and nature of the separation on the one hand and the importance of the functional connection on the other. Much reliance was placed by the appellant on the *Glasgow University* case, in which the Lands Valuation Appeal Court held that the reading-room across the road from the main university buildings fell to be entered in the roll as a separate heritable subject, though the use of the reading-room formed an integral part of the students’ university work. It is to be observed, however, that while saying that the functional test played little part in the question, Lord Keith did not suggest that it was not a relevant test. Further, it is to be observed that the court in that case were upholding a determination of the valuation committee, and accordingly were holding that the committee had not gone wrong in law in giving decisive weight in that case to the geographical test. It does not follow that the decision would have been the same if the valuation committee had held that the reading-room should be entered in the roll with the main university buildings as a single heritable subject.

In these circumstances I cannot hold that the Lands Tribunal erred in law. What weight was to be given to the different considerations was for the tribunal after hearing the evidence and viewing the premises.”

The main argument of the appellants in support of the contention that the property in this case should be treated for rating purposes as five separate units is based on the case of *Municipality of Mombasa v. Nyalali Ltd.* (3). In that case the respondent owned 600 acres previously used for agricultural purposes within the municipality of Mombasa. More than half of it was leased under a sub-divisional scheme involving subdivision into residential plots and the remaining 222 acres were also divided into 107 plots such plots forming part of the original sub-divisional scheme, with minor variations. In 1955 the draft valuation roll by the municipality purported to show the unimproved site valuation of each plot of the 107 unalienated or unleased plots separately and in valuing each plot the valuer was influenced by the price to which similar plots had already been sold.

The respondents objected to the mode of valuation and during the hearing of the objection by the valuation court certain questions of law arose as a result of which a case was stated for the opinion of the Supreme Court whether inter alia “the valuation of the municipal valuer was correct” (in valuing each sub-plot as a separate entity). The Supreme Court ruled that the sub-divided plots in the company’s scheme could be treated as separate hereditaments for rating purposes. On a subsequent appeal to the Supreme Court after the hearing in the valuation court had concluded the same learned judge felt convinced that his earlier opinion that the plots of the subdivision scheme should be treated as separate hereditaments for rating purposes was wrong and on appeal on that issue to the Court of Appeal, Sir Trevor Gould, J.A., said:

“In the judgment under appeal the learned judge next dealt with the question of the rateable unit or hereditament. This is a concept which is not defined either in the English or Kenya legislation. Counsel for the respondent sought to draw from the provision of s. 26 of the Local Government (Rating) Ordinance, read with s. 5 and in the general context of the Ordinance, an indication that the rateable unit (at least prima facie) was the land of a person as shown in the title or title deeds registered under the Registration of Title Ordinance (Cap. 168), the Crown Lands Ordinance (Cap. 155) or the Land Titles Ordinance (Cap. 159) . . . I think that all that can be drawn from this is an indication that it has not been the practice to regard the registered title as concluding the matter. In the supreme Court the learned judge was guided by tests laid down in *Gilbert (Valuation Officer) v. S. Hickinbottom & Sons Ltd.*, (1956) 2 Q.B. 40 in which Denning, L.J. (at p. 48) said that there was no statutory definition but that the practice prevailing for many years warranted certain general rules. Subject to any evidence of practice which might be given in Kenya, I do not think that the fact that the English rating system is generally based on annual value and not on unimproved value necessarily renders the tests laid down wholly inapplicable in Kenya. There would be a need for caution, but the tests appear basically to embody a commonsense approach.

The learned judge relied upon the rule laid down by Denning, L.J., that generally when two properties are within the same curtilage or contiguous to one another and are in the same occupation, they are to be treated as a single hereditament. He placed weight also upon the words of Parker, L.J., at p. 54, indicating the importance of whether the premises formed a single geographical unit and could be ringed round on a map. The judge said with regard to the subdivision, that it only made it practicable for the land to be divided, that it was not divided in law until legal steps of registration were taken, and that while it was undivided it was one hereditament. It was stated by Morris, L.J., in *Gilbert v. S. Hickinbottom & Sons Ltd.*, at p. 52, that whether premises form one hereditament for rating purposes is a question of fact; it was also so held in *North Eastern Ry. Co. v. Guardian of York Union*, (1900) 1 Q.B. 733. On this second appeal this court is restricted to questions of law and unless the judge has erred in principle in arriving at his decision on this question it would not be for this court to interfere. I cannot say that the judge’s view of the application to the facts of the case of the tests mentioned is unreasonable and if there is room for any error in principle in the approach adopted (and I do not say there is) it lies in the question of the effect of the subdivision, which the learned judge regarded as existing for the purpose of his consideration of this aspect of the case. This is a matter which cannot assist the appellant in any way, in view of the finding of the learned judge, with which I agree, that the subdivision amounted to an improvement. The valuer is enjoined by the Local Government (Rating) Ordinance to ignore it when arriving at the valuation of

the unimproved land. When he sets out to value the land he must visualise it as unsubdivided, and that leaves him no basis for saying that he will take separately as rateable units all the plots of the subdivision . . .

A similar answer may be given to a further submission by counsel for the appellant based on *Tetzner's* case. The valuer in that case notionally divided the unimproved land into a number of separate lots to which he applied different values. To give only one example from his evidence, he considered certain elevated lands with a good view and easy contours as being suitable for dwellings. The valuer totalled these various values to arrive at the value to be placed upon the whole. No objection was taken to this course in the Privy Council. Counsel for the appellant has submitted that, even if the subdivision in the present case is to be ignored, the same principle would entitle the valuer to make a notional subdivision and arrive at the same result. I think this is going too far. The valuer could legitimately put a higher value, for example, on the parts of the land which are nearer to the sea than others or take note of other geographical features in arriving at the value of the whole. He would also be entitled to take into account the suitability of the land for subdivision, but, being enjoined to treat the actual subdivision and roads as if they had not been made, he could not go further. The practice of the appellant's valuer (referred to in the facts above stated) to treat as separate rateable units all subdivisional plots beacons and numbered, cannot prevail against the injunction implicit in the definitions of 'improvements' and 'unimproved property'.

For these reasons I consider that the learned judge was correct when he found that no assistance was to be drawn in the present case from what was decided in the *Maori Trustee* case, and that the land must be valued as one unit."

It seems clearly settled by the authorities that whether property is to be regarded for rating purposes as one unit or hereditament or as several units is essentially a question of fact for the determination of the Valuation Court and provided in so determining there has been no application of wrong principle or law an appeal court should not disturb or reverse such finding of fact. In the instant case I do not agree with the contention of the appellants that the railway tracks should be treated in the same category as a public road simply because the land on which the tracks are constructed are exempted from valuation. Both the land and the tracks still belong to the respondents and form an integral and important part of the whole site geographically and functionally, and cannot be said to separate one part of the land from any part of the rest in any way. I am of the opinion further that in spite of the operational areas being exempted from valuation for rating purposes, the railway tracks, etc. nevertheless fall within the definition of improvements under Cap. 317 and "the valuer must not merely treat any improvements as not being there, he must proceed on the basis that they have never been there at all" (*Toohy's Ltd. v. Valuer General* (4); *Gollan v. Randwick Municipal Council* (5)). But even if it can be said that the hereditament is divided geographically by the railway tracks into units it was a question of fact for the determination of the Valuation Court whether the whole of it can still be treated as one unit for rating purposes or not. In his ruling the learned magistrate made the following finding of fact: "The essential difference here is that the subdivisions and the track which subdivides them are all owned and occupied by the same authority, and I find that functionally all parts are essentially one whole". The learned magistrate's attention was called to the relevant authorities on the points of law involved and he must have had them well in mind when he made the finding of fact that the hereditament should be treated as one unit. No cogent reason has been advanced before me to show that the

learned magistrate erred in principle of law or in fact in coming to such a conclusion or that the finding was “one to which he could not have reasonably come”. Even where, in *Gilbert (Valuation Officer) v. S. Hickinbottom & Sons Ltd.* (2), the judges of the Court of Appeal found it very difficult to distinguish the case on appeal from the facts of previous cases before the court in which contrary findings of fact had been arrived at, the appeal was nevertheless dismissed the court treating the case as rather an exceptional one depending upon its particular facts. This ground of appeal must therefore fail.

The next point to be dealt with is the method of valuation to be applied in this case. For the appellants it has been urged that what is generally described as the “comparative method” is the one most suitable in this case and the one that has always been applied in valuation throughout East Africa even in the valuation of railway property. For the respondent it has been contended however that the “comparative method” is inapplicable in this case since by reason of the peculiarity in the rating law of Tanzania applicable in the present case there are no properties with which the property of the respondent can be suitably compared. This, according to the respondent, is because of the effect of an amendment in the definition of “unimproved value” introduced into the definition under the Local Government (Rating) Ordinance (Cap. 317) by Ordinance No. 3 of 1961.

Under s. 6 of the Ordinance (Cap. 317) every valuer, in preparing a Draft Valuation Roll has to show to the best of his knowledge and opinion:

- “(a) the area and situation of the property valued;
- (b) the name and address of the owner thereof;
- (c) *the unimproved value of the land*;
- (d) the value of any improvements.”

Under s. 14(1) of the Ordinance (Cap. 317) “site rate” has to be made and levied by the local authority with the consent of the minister upon the unimproved value of all land that is rateable property based upon the valuation shown in the Valuation Roll prepared by the valuer and finally certified by the Town Clerk. It should be noted that this method of determining the rate which is payable by the owner of the land whose name is shown in the valuation roll is different from the practice and law of England where the rate is based on the annual value of the land, including any buildings and improvements thereon, and is payable by the tenant or occupier. Originally the term “unimproved value of land” for rating purposes in Tanganyika was defined by s. 3 of the Ordinance (Cap. 317) as “the sum which the freeholding interest in such land together with possession thereto, if unencumbered by any mortgage or any charge thereon, might reasonably be expected to realise if brought at the time of valuation to voluntary sale on such reasonable terms and conditions as a bona fide seller might be expected to impose if the improvements, if any, thereon or appertaining thereto had not been made”. By the provision of Ordinance No. 3 of 1961, however, the said definition was amended by the addition at the end thereof of the words “and having regard to any restrictions on or affecting the land imposed by the local authority, or town planning authority, or by or under any bye-laws”. According to the evidence before the Valuation Court, in the 1959 valuation roll which was prepared by Mr. Kilner prior to the amendment, the “comparative method” was used in the valuation of the property and there was no objection to the valuation. In the present Draft Valuation Roll prepared by Mr. Wood, the same method has been used and the same valuation arrived at, in spite of the amendment in the definition of “unimproved value of land”. The main reason for the respondent’s objection was that restrictions on or affecting the land had been imposed within the meaning of the amendments to the definition by the zoning of the property exclusively for use as Railway Reserve (as shown in the Plan

(Ex. 1) prepared by the Town Planning Officer, Plan No. 5/70/1255 dated November, 1959 and described as Planning Proposals), and that by reason thereof the valuation could not be the same neither could there be any comparable property in the township for the “comparative method” to be applied. It was argued therefore that the profits method was the most suitable method in the circumstances to be applied.

Before the valuation court, both the respondent and the appellants conceded, as they have done before this court, that if the zoning of the property as “Railway reserve” did not constitute a restriction within the meaning of the amendment then the comparative method would appear to be the appropriate method to be used in this case. Both sides called evidence in support of their respective points of view and the Valuer, Mr. Wood, also gave evidence in support of his valuation, saying that he assessed the property on the basis of comparison with values of nearby freehold land put to the best use as commercial or industrial land without being bound to take into account the “Planning Proposals” in which the property was shown as Railway Reserve, since the zoning did not constitute a legal restriction on the use to which the land could be put. The learned senior resident magistrate in his ruling said:

“Thus I have to decide whether there is a restriction or not, and largely upon the answer to this depends which method of valuation is used; . . .

The valuers of Arusha are estopped from denying that they used this plan with regard to the Railways; clearly both Mr. Wood and Mr. Kilner were lenient because the property was Railway property; clearly something was deducted because by comparison with next door property the difference is so vast.

Finally even if the plan is only a draft it is a proposal which a prudent buyer must take into account. All the witnesses against a restriction were forced to admit this although they qualified it by saying that it would be advisable to consult the Planning Authorities.

I am of the opinion that the distinction between draft plan and approved plan is being pushed too far. The phrase in the definition of ‘unimproved land’, ‘is . . . the sum which . . . such land . . . might reasonably be expected to realise . . .’. In considering this it is realistic to emphasise that the Railway exists, that it is unlikely to cease operations and that more likely it will expand. The very fact that the Railway Reserve extends over much more land than they are at present using, indicates that Arusha’s Planners have been prudent in allowing for expansion.

Even if the Township would be willing to lop off a piece of this land for industrial or other use, nevertheless it has for the moment been set aside for Railway user. Even if the Township consented to a further excision it seems to me the Railways would have a strong power of objection; even if they did not object then the Land Office might.

All this must be taken into account by a prudent buyer and I find there is a restriction affecting the land and imposed by the Town Planning Authority.”

In Ground (iv) the appellants contended that the court erred in law in taking into account what a prudent buyer might take into account (as appears in the last paragraph of the above quotation from the Ruling). It was argued that the court should have confined its considerations to the effect, if any, of “such reasonable terms and conditions as a bona fide seller might be expected to impose” as stated in the definition of “unimproved land” under the Ordinance. To my mind the price that a prudent buyer might be prepared to pay and that which a bona fide seller might accept can in practice be regarded as the obverse and reverse of the same coin for it is obviously not only what a bona fide seller thinks

land is worth or what conditions he imposes on a sale that determines the market price; what a prudent purchaser is prepared to pay is often most material in the determination of the hypothetical price. The respondent has referred to Australian cases in which the definition of “unimproved land” which had to be valued was not dissimilar to that in the rating laws of Tanganyika prior to the amendment of 1961. In the case of *Duncan and Others v. The Federal Commissioner of Land Tax* (6), Griffith, C.J., said:

“The definition of ‘unimproved value’ in s. 3 of the Act is this: ‘the capital sum which the fee simple might be expected to realise if offered for sale on such reasonable terms and conditions as a bona fide seller would require’. The underlying idea is that the land is to be treated as converted into money as on the day as of which the assessment is made, so that a realised capital sum takes the place of the land. That, of course, assumes a hypothetical purchaser. It does not mean that you are to inquire whether there was at that time a purchaser in existence who would have been willing to buy the particular parcel of land. That was pointed out in *Spencer v. The Commonwealth* (13) which was a case of land resumed by the Commonwealth from a private owner under Lands Acquisition Act, 1906, under which compensation equal to the value of the land taken is to be paid to the owner. That Act does not contain any definition of the term ‘value’ the meaning of the term was discussed by the court. I said: bearing in mind that value implies the existence of a willing buyer as well as a willing seller, some modification of the rule must be made in order to make it applicable to the case of a piece of land which has any unique value. It may be that the land is fit for many purposes, and will in all probability be soon required for some of them, but there may be no one actually willing at the moment to buy it at any price. Still it does not follow that the land has no value. In my judgment the test of value of land is to be determined, not by inquiring what price a man desiring to sell could actually have obtained for it on a given day, i.e. whether there was in fact on that day a willing buyer, but by inquiring ‘What would a man desiring to buy land have had to pay for it on that day to a vendor willing to sell it for a fair price but not desirous to sell?’. It is, no doubt, very difficult to answer such a question, and any answer must be to some extent conjectural. The necessary mental process is to put yourself as far as possible in the position of persons conversant with the subject at the relevant time, and from that point of view to ascertain what according to the then current opinion of land values, a purchaser would have had to offer for the land to induce such a willing vendor to sell it, or in other words, to inquire at what point a desirous purchaser and a not unwilling vendor would come together.”

This passage was quoted with approval by Murray, C.J., in the case of *Rymill v. Federal Commissioner of Taxation* (7). In this case Mr. Wood, the Valuer, admitted in cross-examination that the definition of “unimproved value” would require a valuer to put himself in the shoes of a potential purchaser in making a valuation. Even if the learned magistrate erred in considering as material what a prudent buyer might take into account (and I do not consider that he did) I agree with counsel for the respondent that the statement complained of does not in fact affect the question whether or not there were any restrictions within the meaning of the definition of “unimproved value” under the Ordinance as should be taken into account in the valuation of the railway land.

In coming to a decision whether or not restrictions have been imposed on the property by the “zoning” of it as Railway Reserve in the Plan Proposals of the Town Planning Department (Ex. 1), the learned senior resident magistrate merely made a finding that “there is a restriction affecting the land and imposed

by the Town Planning Authority” without specifying by which Town Planning Authority or under what law the said restriction is imposed. It is necessary to consider carefully the law under which any Town Planning Scheme can be imposed in the Township of Arusha. Throughout the arguments before this court both parties referred to the Town Planning Ordinance Cap. 378 and gave the impression that its provisions were applicable to the Township of Arusha. Under s. 13 of the said Ordinance its provisions become applicable to any area if, after consultation with a Local Authority of the area, the Minister responsible for Town and Country Planning is of the opinion that a general planning scheme should be made in respect of any area and he then, by order published in the Gazette, declares that area to be a planning area. It is after such declaration that an Area Planning Committee is established for the planning area which is constituted a Preparatory Authority responsible for preparing a general planning scheme area which, after the formalities as to publications, inspections and objections in accordance with the provisions of the Ordinance, takes effect seven days after its approval by the Minister and publication in the Gazette. Arusha Township has not been declared a planning area and therefore no general planning scheme under Cap. 378 can be made for the township and no detailed scheme for the development of any area within Arusha can be made under s. 24 of the Ordinance. Under s. 81 the Ordinance (Cap. 378) which repealed the Town Development (Control) Ordinance (Cap. 103) provision was made whereby the Ordinance (Cap. 103) “shall continue to apply to any area to which any part thereof applies immediately before this ordinance comes into force as if that Ordinance had not been repealed and shall continue so to apply to any such area until such area or any part thereof becomes a planning area”. Parts I, II, III of the Town Development (Control) Ordinance (Cap. 103) were made applicable to Arusha by the Town Development (Control) (Application) Order (printed at p. 35 of the Subsidiary legislation of Cap. 378 in Vol. IX of the Revised Laws). It follows that any planning scheme or proposal relating to Arusha, whether made by the Town Planning Department or not, cannot have any effect or be recognised as a scheme under Cap. 378 and can only be considered under the provisions of the Town Development (Control) Ordinance (Cap. 103) under Part III of which the Arusha Town Council, being the Authority, can prepare a planning scheme for the township “*restricting* and regulating the type of buildings which may be erected on the land comprised in the area to which the scheme applies and the manner in which and the purposes for which the said land and buildings may be used”. (Section 21).

Under s. 22 of the Ordinance (Cap. 103):

“Every planning scheme shall define the area to which it applies and may, within this area, make provision for all or any of the following matters:

- (a) the reservation of areas for residential, commercial and industrial buildings respectively;
- (b) the provision of special areas for factories or for carrying on industries generally and for shops, warehouses, stores, stables and other buildings used for commercial or industrial purposes;
- (c) fixing sites for buildings required for charitable, religious or public purposes, churches, schools, hospitals, educational and recreational institutions, libraries, theatres and other places of public entertainment, amusement or refreshment;
- (d) fixing sites for public conveniences;
- (e) open spaces.”

Such a planning scheme has to be published in the Gazette and a notice has to be published at least once in a local newspaper containing the particulars set

out in s. 23 of the Ordinance, and such scheme shall only be of full force and effect after it has been approved by the Governor in Council by an order published in the Gazette in accordance with the provision of s. 24 of the Ordinance. It is specifically stated under s. 24(1) however that “a planning scheme prepared under this Part shall not have effect unless it is approved by the Governor in Council”. Much as I appreciate the findings of the learned senior resident magistrate on this issue and the force of the arguments of the respondent’s advocate that Arusha Town Council, like most local authorities, in practice and in fact have placed restrictions on the use of certain lands within the township or area by “zoning” special areas for particular purposes thus purporting to make provision for the matters mentioned in s. 22 of the Ordinance (Cap. 103) and that the Arusha Town Council has used the Planning Proposals as a guide to plan and “zone” sites and areas, I find it difficult to see how a court of law can sanction and take judicial notice of such “zoning” or restrictions in a scheme which has not been approved by the Governor in Council, or his successor in title, in the face of the express and mandatory provisions of s. 24(1) of the Ordinance that such a planning scheme shall not have effect unless such approval has been given. I am unaware of any such approval and since none has been brought to my notice during the hearing of this case, I can only conclude that any purported restriction or regulation based on the Planning Proposals is ultra vires the powers of the Authority and cannot be regarded as a restriction by a local authority within the definition of “unimproved value” under the Local Government (Rating) Ordinance. I can well understand and appreciate the reason why the Arusha Town Treasurer, Mr. Lyimo, said in evidence that he had been through all the records of the Council and could find no restrictions put by the Council. It has not been suggested further that there is any bye-law imposing any restriction on or affecting the property and I am not aware of any. In the result I am bound to hold that there are no restrictions on or affecting the land “imposed by the local authority or town planning authority or by or under any bye-law” and the appellant must succeed on Ground (iii) of the grounds of appeal.

In view of my decision above it is not necessary for me to go into great detail as regards Ground (v). Had I been convinced however that there is a restriction imposed within the amended definition of “unimproved value” I would not have accepted the submissions of appellants’ advocate that the comparative method is necessarily the only or the correct basis that should be used in valuation of land for rating purposes under Cap. 317. Much has been made of the case of *Gollan v. Randwick Municipal Council* (5) which is an Australian case in which the comparative method or basis was used where valuation for rating purposes had to be assessed on the unimproved value of land. In that case, objection was taken to the assessment on the ground that account should be taken of restrictions contained in the deeds of grant by the Crown which vested the land in the appellant’s predecessors in title subject to a peppercorn quit rent on the trusts and subject to conditions, reservations and a proviso in the deeds restricting the user of the land for certain purposes only and stipulating the forfeiture and reversion of the land to the Crown should it be used for any other purpose. The Privy Council held that the unimproved value of the land should be assessed on the hypotheses of an unencumbered fee simple estate subject to no condition restricting the use and enjoyment of the land and that therefore the restrictions in the deeds of grant should not be taken into consideration in assessing the unimproved value. I do not think that the principle laid down by the Privy Council materially affects the decision on any of the issues in this case. There is no doubt that the property was granted by the Government of Tanganyika to the respondent for the special and restricted purpose of running a railway and when a part of the land, originally granted to the respondent, was required

to be leased by another company for other purposes that part had to be surrendered to the Government before the company could lease it. The objection of the respondent in this case was not based on the fact that any restriction in the title or grant as to the user of the land should be regarded as a restriction within the amended definition of “unimproved value” neither has it been contended that by reason of any such restriction as to user the profits basis or method should be applied instead of the comparative method or basis. In my opinion the *Gollan* case is not of much help on this particular issue as to which basis of valuation to apply in this country to railway property if there is a restriction imposed by a local authority or a town planning authority or a bye-law. The fact that the comparative method has been used for many years in the valuation of railway property in East Africa is no sufficient argument for its retention exclusively and for all time even where, by reason of changes in the law or in particular circumstances, it is found to be difficult or indeed impossible to make any comparisons. There is no legal or judicial authority for any such assumption. In England where the mode of ascertaining the value of land for the purpose of liability to the rate by the occupier is by reference to a hypothetical tenancy, namely, the rent at which the hereditament with all improvements thereon or appertaining thereto might reasonably be expected to let from year to year, public utility undertakings including railway undertakings, which have not been nationalised, must, in the absence of special circumstances be valued on the profits basis as a matter of law. But this has not always been the case and different methods of valuation were applied until by the decisions of the courts the profits method came to be universally applied as a matter of law. Thus in *Barking Rating Authority v. Central Electric Board* (8), it was said in the Court of Appeal:

“It was stated before us that quarter sessions held that they were bound to adopt the profits basis by reason of the decision of the House of Lords in *Kingston Union Assessment Committee v. Metropolitan Water Board* (1926), A.C. 331, and we approach this case as did the Divisional Court on the footing that quarter sessions did so hold. Since that decision, in our opinion, it must be regarded as a rule of rating law that in the case of a public utility undertaking whose operations extend over areas beyond the limits of an individual parish, the profits basis is the only method to be applied in fixing the value in any particular parish, unless there are some special circumstances which render that method impossible of application.

We need not in this judgment set out the theory on which this basis is founded. It has been applied ever since the judgment of the Queen’s Bench in *R. v. Mile End Old Town Overseers*, 1847, 10 Q.B. 208 followed by *R. v. West Middlesex Water Works Company*, 1859, 1 E. & E. 716 and is fully explained by Lord Hailsham in *Railway Assessment Authority v. Southern Railway Company*, 1936, A.C. 266, 275 . . . In our opinion it is settled by the two cases in the House of Lords to which we have already referred (the *Kingston* case and the *Southern Railway* case) that the profits basis has to be calculated not on what may happen in the future but on the profits ascertained down to the latest period before the date of the rate or, in this case, the preparation of the valuation list.”

In *Robinson Brothers (Brewers) Ltd. v. Durham County Assessment Committee* (9), Lord Macmillan said (at p. 339):

“It is right, however, that I should notice an argument which was strenuously advanced by the appellants namely, that even if your Lordships should be dissatisfied with the soundness of the decision in the *Bradford* case this House should not disturb it in view of the fact that it has stood for forty years without being overruled and has regulated practice during that long period.

The case is not a favourable one for the application of the doctrine of stare decisis. The decision on behalf of which it is invoked is both embarrassing and unjust – embarrassing because even the experienced counsel who appeared at your Lordship's bar had considerable difficulty in explaining what it decided and what evidence it ruled out, and to valuation authorities it is not likely to be more easy of comprehension; unjust, because the unduly low valuation of public houses to which it has given rise places an unjustifiable burden on occupiers of other hereditaments. In the recent case of the *Westminster Council v. Southern Railway and W. H. Smith & Son*, your Lordships overruled a much more venerable rating decision and I see no reason why more indulgence should be extended to the *Bradford* case (*Bradford-on-Avon v. White*, [1898] 2 Q.B. 630)."

I see even less reason why more indulgence should be extended to a rating practice which has not the backing of a single judicial decision if a change of the law makes it no longer operative or applicable to any particular valuation. I do not see why difficulties of calculation in the application of the profits method or basis as mentioned in the evidence of Mr. Farnworth, the Chief Valuer for Nairobi City Council should be a stumbling block in the acceptance or application of that method of valuation in this country in certain cases. Such difficulties were encountered by the courts in England until the courts were "compelled to evolve a system of calculation with the assistance of the expert advisers to the rating authorities and to the undertakings which involved a number of very different assumptions, but which received the approval of your Lordships' House on a number of occasions and which became recognised as the standard method of assessing the rateable value of hereditaments in these cases" (see *Railway Assessment Authority v. Southern Railway Company* (10) [1936] 1 All E.R. at p. 29). Even where the application of the profits method resulted in a nil valuation, the Court of Appeal in the case of *British Transport Commission v. Hingley* (11) refused to reject or to modify it in the absence of special circumstances. The Australian Courts, in cases where the valuation is based, not on the annual value and a hypothetical tenant as in England, but on the unimproved value of land as in East Africa, have found it possible to apply the profits method in certain cases. To quote from but a few of the cases in which the profits method has been applied, in *Dymock's Book Arcade Ltd. v. Federal Commissioner of Taxation* (12) the court in its judgment said:

"There is no evidence of a sale of comparable land. There is evidence of many sales of land which, like the subject land, has the advantage of being situated in the heart of the city. But, because of the unique character of the subject land, which is in the main back land, none of the Commissioner's witnesses, apart from Mr. Hibble, applied the evidence of other sales in any other manner than by the Somers curve. Mr. Hibble's evidence is disclaimed by the Commissioner.

The proper principle to apply, in this case, to determine the value of the unimproved land, is that by Starke, J., in *Russell v. Federal Commissioner of Taxation*, 50 C.L.R. 182. Because little or no unimproved land exists in the district, and none is offered for sale or sold in that condition, he was impelled to fall back upon the process which is often used of deducing the unimproved value from the productiveness of the land when suitably improved. This involves finding what expenditure, if the land were in an unimproved condition, would be required to furnish the improvements, plant and stock to turn to proper account its potential earning capacity, capitalising the estimated annual income it would then produce, and deducting from the capital value thus obtained of the entire undertaking the

expenditure upon improvements, plant and stock, leaving a residue representing the capital contained in the unimproved land.”

Even in *Rymill v. Federal Commissioner of Taxation* (7) where the application of the profits method as stated in the case of *Spencer v. The Commonwealth* (13) resulted in a nil valuation the appeal court approved of the profits method used.

Having come to the conclusion, however, that any restrictions on the user of the land should not be taken into consideration by the reason of the specific provisions of s. 24(1) the Town Development (Control Ordinance (Cap. 103), I find that the comparative method is the correct method of valuation to be applied in this case. In view of my decision that the property should be valued as one unit and not as five or eight units I find that there is not enough evidence on record from which a fair and just valuation can be arrived at by this court applying the comparative method to the property as a single unit. I therefore remit the case to the valuation court for further evidence to be taken of the unimproved value of the land as a single unit and for the valuation as determined by that court on such evidence to be entered on the valuation roll.

Appeal allowed. Case remitted to the Valuation Court for taking further evidence.

For the appellant:

P. A. Clarke and P. H. Hutchinson, Arusha

For the respondents:

The Legal Secretary, E.A.S.C.O

M. W. Christian (Asst. Legal Secretary, E.A.C.S.O.)

The Changombe Construction Co, Ltd v Khatijabai Ebrahim K Shivji [1966] 1 EA 379 (HCT)

Division:	High Court of Tanzania at Dar-es-Salaam
Date of judgment:	18 July 1966
Case Number:	1/1966
Before:	Mustafa J
Sourced by:	LawAfrica

[1] Rent restriction – Tenant purchase scheme – Purchase by monthly instalments – Default in instalments – Application to Rent Restriction Board for arrears and possession – Whether instalments rent – Whether Rent Restriction Board has jurisdiction – Purchaser in occupation of premises – Rent Restriction Act, s. 3A and s. 7 (T.).

Editor's Summary

The appellant company had been formed with the object of buying up land and constructing dwelling houses for sale to its shareholders on a tenant-purchase basis. The respondent who was such a shareholder was allotted a house under an informal document and was required to pay monthly instalments of Shs. 150/- for a period of sixteen years from the date of occupation of the premises. On payment in full the land in question was to be transferred or assigned to the respondent but on failure to pay the monthly instalments the appellant could in its discretion evict her and give possession of the suit premises to another share-holder. The respondent fell into arrears whereupon the appellant applied to the Rent Board claiming a sum of Shs. 2,850/- in respect of rent or mesne profits. The respondent denied that she was a tenant or that the premises were either leased or let to her. She maintained that she had agreed to purchase the premises

and that the monthly payments were instalments towards the purchase price and not rent. She therefore claimed that this not being a matter of letting between landlord and tenant, the Rent Restriction Board had no jurisdiction. The Rent Restriction Board upheld this submission and dismissed the application whereupon the appellant appealed. At the hearing it was not in dispute that the appellant was registered as owner of the right of occupancy nor that the informal document purporting to dispose of the right of occupancy was void.

Held –

- (i) there was no evidence as to the nature of the monthly payments;
- (ii) since the appellant was the owner of the right of occupancy and the premises, it was clear that the respondent was an occupier;
- (iii) in view of s. 7(i)(h) of the Rent Restriction Act the Board had jurisdiction to entertain the application because that provision gave the Board jurisdiction to make orders in respect of mesne profits and such orders were applicable to any person whether or not he was a tenant, provided that at the material time he was in occupation of the premises as occupier.

Appeal allowed. Proceedings remitted to the Rent Restriction Board to deal with the matter accordingly.

Cases referred to in judgment:

- (1) *Fazal Kassam (Mills) Ltd. v. Abdul Nagji Kassam and Shubanu Bai Gulamhusein*, [1960] E.A. 1042 (T.).
- (2) *Dunthorne and Shore v. Wiggins*, [1943] 2 All E.R. 678.

Judgment

Mustafa J: The appellant, Changombe Construction Co. Ltd., was the original applicant before the Rent Restriction Board, Dar-es-Salaam. That application before the Board was “dismissed” presumably on the ground that the Rent Board found it had no jurisdiction to entertain the application. From that decision the appellant appeals.

The facts are generally not in dispute. The appellant company is a limited liability company of which the respondent is a shareholder. The appellant company was formed by a number of Ismailia Khojas with the object of buying up land and constructing dwelling houses thereon for sale to its shareholders. The respondent as such shareholder, on her application to the company was allotted a dwelling house which the respondent proceeded to purchase more or less on the lines of a tenant-purchase basis. The appellant company was registered as owner of the right of occupancy over the land on which it built the house and it seems the respondent, by a rather informal document, applied to the company for allotment of the suit premises, which the appellant company granted to the respondent. This document was Exhibit B before the Rent Restriction Board, and was signed by the respondent but not by the appellant company. In it the respondent requested that the suit premises, viz. Plot No. 125, Changombe, be allotted to her on condition that she would pay for the cost of the building and various other outgoings mentioned in the document, as well as payment of an initial amount, and that in respect of the balance she was to pay by monthly instalments of Shs. 150/- for a period of sixteen years from the date presumably of occupation of

the premises. When payment in full has been made the land in question is to be transferred or assigned by the appellant company to the respondent. The respondent also agreed, inter alia, that if she failed to pay the monthly instalments of Shs. 150/- on or before the 5th of every month for a period of six months, the appellant company may, in its discretion, evict her and give possession of the suit premises to another shareholder. In such

an event the respondent would have no right to any instalments already paid by her, and she would vacate the suit premises.

It appears the appellant company allotted the suit premises after they were completed to the respondent who thereupon entered into occupation and commenced payment of the agreed instalments. It seems on the date of the application before the Rent Board in January, 1964, the respondent was in arrears of the monthly instalment payments for two or three years.

The appellant company purported before the Rent Board to claim Shs. 2,850/-:

“being the arrears of the rental from June, 1962 to 31st December, 1963 inclusive agreed to be paid at the rate of Shgs. 150/- per month in respect of the said suit premises occupied by the Respondent as the Applicants’ tenant, which arrears the Respondent has failed or neglected to pay despite demand OR Alternatively for the use and occupation of the suit premises during the said period at the agreed rate of Shgs. 150/- per month or being a reasonable amount.”

The respondent’s argument is that she was never a tenant of the appellant company, nor were the premises either leased or let to her. She maintains she had agreed to purchase the premises on the basis of the document Exhibit B, and on the basis of that document she was allotted the premises and payments of Shs. 150/- per month were not in respect of rent, but were instalment payments towards the purchase price. She claimed therefore that this not being a matter of letting between landlord and tenant, the Rent Restriction Board had no jurisdiction. It seems that the Rent Board accepted this submission and “dismissed” the application.

In the first place the document being Exhibit B, is clearly inoperative if it purported to be an agreement of sale of the right of occupancy. It is common ground that the land in question was a right of occupancy and the relevant regulation under the Land Regulations, Cap. 113, being reg. 3, reads as follows:

- “(1) A disposition of a Right of Occupancy shall not be operative unless it is in writing and unless and until it is approved by the Minister.
- (2) In this regulation ‘Right of Occupancy’ means a Right of Occupancy granted under section 6 or section 11 of the Land Ordinance.
- (3) In this regulation ‘disposition’ means –
 - (a) . . .
 - (b) . . .
 - (c) a deed or agreement or declaration of trust binding any party thereto to make any such disposition as aforesaid, including a deed or agreement entitling a party thereto to require any such disposition to be made.”

It seems that Exhibit B purports to be an agreement to dispose of a right of occupancy in terms of reg. 3(3)(c) and as such it is inoperative for lack of consent. There is a line of decisions on this matter, and I will merely quote *Fazal Kassam (Mills) Ltd. v. Abdul Nagji Kassam* (1) in support. Indeed the advocate for the respondent does not deny that Exhibit B is inoperative as such. In view of the fact that Exhibit B is inoperative, I will exclude it, as in my view no rights of any description arise out of that document. It is in fact void.

If that is so, the respondent cannot be considered to be the intending purchaser of the suit premises under an agreement of sale, and there is therefore no evidence, once Exhibit B is excluded, as to what the

payments of Shs. 150/- per month which the respondent paid to the appellant company would be. In view of the

fact that the appellant company is the owner of the right of occupancy and the premises, it is clear that the respondent is an occupier, and even if there is no evidence that she occupies as tenant either for a term or at will or at sufferance, she at least would be an occupier. The alternative claim by the appellant company for use and occupation of the premises would be in order, accepting, as I would do in this instance, that the appellant company cannot prove that the respondent occupied the premises as a tenant.

Section 7 of the Rent Restriction Act reads:

- “(1) A Board shall, in relation to the area for which it is established, have power to do all things which it is required or empowered to do by or under the provisions of this Act, and without prejudice to the generality of the foregoing shall have power –

* * * *

- (h) to make orders, upon such terms and conditions as it shall think fit, for the recovery of possession and for the payment of arrears of rent and mesne profits, which orders may be applicable to any person, whether or not he is a tenant, being at any material time in occupation of any premises;”

This provision empowers the Rent Board to act in respect of the recovery of mesne profits from an occupier who is not a tenant. This appears to be the case here.

In my view, the Rent Board was wrong in holding in effect that it had no jurisdiction to entertain the application, and on this ground I would remit the matter to the Rent Board to deal with in the usual course. I am satisfied that the respondent is not a tenant of the appellant company. Section 3A (Rent Restriction (Amendment) Act, 1963) reads:

- “(1) ...

- (b) any person –

- (i) has entered into occupation of any dwelling which he has agreed to purchase under an agreement which provides that part of the purchase price shall be paid in advance of the remainder thereof; or
- (ii) has entered into occupation of any dwelling associated with any dwelling which he has so agreed to purchase; or
- (iii) has entered into occupation of a dwelling in the circumstances to which para. (a) of this subsection relates and continued in occupation of that dwelling or an associated dwelling in connection with any such agreement to which the foregoing provisions of this paragraph relate, and such agreement is avoided by reason of the failure of the occupier to pay the balance of the purchase price or the refusal or failure of either party to do any act necessary for completion,

the occupier may apply to a Board for a declaration that his occupation shall be deemed to have been a tenancy; and on any such application, the Board shall, unless the person who granted the option or entered into the agreement to sell, as the case may be (hereinafter in this section referred to as ‘the grantor’), satisfies the Board that such option or agreement was granted or entered into in good faith and that the transaction was not designed to grant the occupier a temporary period of occupation of the dwelling, and to enable the grantor to recover possession thereof otherwise than

subject to the provisions of this Act, make such declaration accordingly.”

It seems that in a situation analogous to what appears to be the case here, where a party occupies premises on the basis of an agreement to purchase, the occupier may apply to the Rent Board for a declaration, and when such a declaration has been made by the Board then in terms of s. 3A(2)(a):

“the occupier shall be deemed to have been and to be the tenant of the dwelling, the grantor shall be deemed to have been and to be the landlord of the dwelling and the consideration given for the licence and option or the part payment shall be deemed to have been rent for the period up to the revocation or expiry of the option or the avoidance of the agreement, as the case may be.”

Here there is no application by the occupier for a declaration of the Board and unless and until there is such a declaration, the monthly payment of Shs. 150/- cannot be considered as rent nor can the respondent be considered the tenant of the appellant company. This, I believe, is the situation under the amendment to the Rent Restriction Act I have referred to, which incidentally neither learned counsel quoted to me. Similarly according to English authorities, I do not think in the instant case there is any relationship of landlord and tenant between the parties. I refer to *Dunthorne and Shore v. Wiggins* (2) where the Court of Appeal held, in an agreement of sale of a house by monthly instalments, where the conveyance was to be completed on payment of the instalments, such instalment payments could not be considered to be rent.

However, although the parties are not in relation of landlord and tenant, and even if I were prepared to give effect to the intention of the parties and allow that the respondent was in fact purchasing the suit premises by instalment payments, the respondent was an occupier at the material time, as she had then no right to remain in the suit premises as “purchaser” and she was subject to eviction as she had defaulted in her monthly payments for two or three years. In the circumstances the Board has jurisdiction in terms of s. 7(1)(h) to entertain the application, because that provision gives the Rent Board jurisdiction to make orders in respect of mesne profits and such orders are applicable to any person whether or not he is a tenant, so long as at the material time he is in occupation of the premises as occupier. On this reasoning also the appeal should succeed.

Since I agree with learned counsel for the respondent that the respondent is not the tenant of the appellant company, I will not refer to the authorities he has cited to me in respect of his argument as to what constitutes letting or rent.

In the result I allow the appeal and remit the matter to the Rent Board to deal with in the usual course.

Appeal allowed. Proceedings remitted to the Rent Restriction Board to deal with the matter accordingly.

For the appellant:

N. M. Kassam, Dar-es-Salaam

For the respondent:

M. N. Rattansey, Dar-es-Salaam

I. G. Peera

Division: High Court of Kenya at Nairobi
Date of judgment: 21 July 1966
Case Number: 230/1966
Before: Farrell J in Chambers
Sourced by: LawAfrica

[1] Land Registration – Rectification of register by order of court – Whether court order required to be registered as an instrument – Registration of Titles Act (Cap. 281) s. 32 and s. 64 (K.).

[2] Mortgage – A “legal mortgage” under s. 46 (2) Registration of Titles Act similar to English mortgage under Transfer of Property Act – Whether foreclosure a possible remedy – Registration of Titles Act (Cap. 281) s. 46 (2) (K.) – Transfer of Property Act, s. 58, s. 69 and s. 100A.

Editor’s Summary

The plaintiff had taken out an originating summons claiming foreclosure under a charge upon a suit property whereby the defendant had secured repayment of a loan of Shs. 50,000/-. The defendant admitted the debt and the charge but alleged (a) that the suit was incompetent since at the time of filing the summons the plaintiff’s father was the registered owner of the suit property and that it had been freed and discharged from the charge, and (b) that there could in law be no foreclosure in respect of a charge under s. 46 of the Registration of Titles Act (Cap. 281). In August, 1964, the plaintiff purporting to exercise the statutory form of sale conferred by s. 69 and s. 100A of the Transfer of Property Act sold the property to his father and executed the transfer on December 31, 1964. The sale was challenged by the defendant in other proceedings and was declared to be a nullity. The court had directed the Registrar of Titles on December 20, 1965, to restore the registration of the charge in favour of the present plaintiff. This direction was not carried out until April 26, 1966, by which time the present proceedings were instituted. The defendant averred that the property was registered in the name of the plaintiff’s father and that the charge had been discharged, nevertheless at the time of the hearing the register had been rectified pursuant to the direction of the court. It was submitted that the direction itself should have been registered and that since it was not it was invalid and ineffectual to pass any land or interest therein. The defendant also argued that a charge under s. 46 did not involve any transfer of legal estate in the land and therefore there could be no order for foreclosure. It was also contended that s. 100A (1) of the Transfer of Property Act, which gave the chargee the same rights, powers and remedies as if the charge were an English mortgage to which s. 69 applied, was to be construed as conferring no more than the statutory power of sale. It was further submitted that sub-s. (2) of the same section was subject to the limiting words “except in so far as a contrary intention is expressed or implied” and that in relation to a chargee’s right of foreclosure a contrary intention was implied because of the provisions in s. 67 denying the right of foreclosure to a simple mortgagee. The plaintiff’s submission was that the expression “legal mortgage” in s. 46 (2) must be construed as referring to an English mortgage under the Transfer of Property Act and that the remedies conferred on a chargee were those available to an English mortgagee which were alternatively a suit for foreclosure, a suit for sale or sale under the statutory power of sale.

Held –

- (i) the cancellation of the registration of the sale to the plaintiff's father in pursuance of the court's direction related back to the date before the institution of this suit; therefore, the point on which the defendant relied was no longer open to him as the defect had now been cured;

- (ii) there was no justification whatsoever for limiting the plain words of sub-s. (1) of s. 100A of the Transfer of Property Act and if it was to be given any meaning at all it conferred the right of foreclosure or sale;
- (iii) the plaintiff as chargee under s. 46 of the Registration of Titles Act had by virtue of s. 100A (1) of the Transfer of Property Act a right to bring a suit for foreclosure.

Judgment for the plaintiff. Order accordingly.

No cases referred to in judgment.

Judgment

Farrell J: By this originating summons the plaintiff claims against the defendant foreclosure of a charge upon the suit property whereby the defendant secured repayment of a loan of Shs. 50,000/- made to the defendant. The defendant admits the debt and the charge, but raises two defences:

- (1) that the suit is incompetent since at the time of filing the summons the plaintiff's father was the registered owner of the suit property and the property had been freed and discharged from the charge;
- (2) that there can in law be no foreclosure in respect of a charge under s. 46 of the Registration of Titles Act (Cap. 281).

The first objection can be shortly dealt with. In August, 1964, the plaintiff purported to exercise the statutory form of sale conferred by s. 69 of the Transfer of Property Act read with s. 100a of the same Act. The property was sold to the plaintiff's father and a transfer was duly registered against the title in the name of the plaintiff's father on December 31, 1964. The defendant later filed a suit (C.C. No. 136 of 1965) against the present plaintiff and his father, claiming a declaration that the purported sale was ultra vires and a nullity. He succeeded in the suit and obtained a declaration as prayed, and the learned judge further directed the Registrar of Titles pursuant to s. 64 of the Registration of Titles Act to cancel the registration effected on December 31, 1964 and to restore the registration of the charge in favour of the present plaintiff which had been registered on July 19, 1960.

That direction was given on December 20, 1965, but no immediate steps were taken to extract the decree and bring the direction to the notice of the Registrar. The present proceedings were instituted on February 22, 1966, at which time the above direction of the court had not been carried into effect. The present defendant in para. 10 of his affidavit in reply to the summons averred that the suit property stood registered in the name of the plaintiff's father and that the charge had been discharged. In the circumstances he submitted that the suit was misconceived and should be dismissed.

That affidavit was filed on April 21, 1966. The decree in the earlier suit had been extracted a short time before and on April 26, pursuant to the direction contained in that decree, the entry against the title in respect of the transfer to the plaintiff's father and discharge of the charge was cancelled with effect from December 31, 1964, the date when the entry was made. On May 6, 1966 counsel for the plaintiff served a further affidavit in these proceedings, admitting that the facts to which the defendant deposed in his affidavit were true at the time it was sworn, but averring that they were no longer true as a result of the subsequent rectification of the register pursuant to the order of the court.

Counsel for the defendant relies on s. 32 of the Registration of Titles Act, which provides that an

unregistered instrument shall be invalid and ineffectual to pass any land or interest therein, and he argues that the register is sacrosanct, and that in terms of the register the plaintiff had no locus standi at the time when he

filed the present proceedings. I do not myself think that s. 64 of the Act (which empowers the court to direct rectification of the register) contemplates the registration of any instrument. The direction of the court is sufficient in itself, and while no doubt the registrar must be satisfied that the direction has been given and may require for this purpose to be shown the decree, in giving effect to the direction he is not in my view registering an “instrument”. If that is right s. 32 has no application to the present circumstances. Nevertheless the principle is undoubtedly valid that the register is ordinarily conclusive and not open to challenge, and the defendant might more appropriately rely on s. 23 of the Act. In accordance with that principle it seems clear that at the date of institution of the proceedings the plaintiff was relying on a charge which was no longer in existence, having been cancelled on December 31, 1964. At that stage it seems to me that an application to strike out the summons might have succeeded. But subsequently the entry discharging the charge has itself been cancelled with effect from the date when it was made, and that being so it must be treated now as if it had never been on the register. The cancellation relates back to a date before the institution of the suit, and in my view the point on which the defendant relies is no longer open to him, as the defect on which he relies has now been cured. Such at any rate is the position between the parties. I can see that difficulties might arise if a third party unaware of the direction of the court had dealt with the land in reliance on the register before it was rectified. But that is not the case here, and I hold that the first objection fails.

The second submission, that foreclosure is not a remedy available in the case of a charge under s. 46 of the Registration of Titles Act (Cap. 281), involves some detailed examination of the law of mortgages as set out in the Indian Transfer of Property Act, 1882, and as it was in England before the changes effected by the Law of Property Act, 1925, and again of the effect of amendments to the Indian Act introduced by local legislation in 1959, which in turn calls for some consideration of the post 1925 law in England. The court has been greatly assisted by counsel on both sides in threading its way through a jungle of complicated legislation in which it is easy to lose one’s way.

A charge under s. 46 of the Registration of Titles Act must be executed in one of two forms set out in Sch. 1 to the Act, in both of which the operative words are to the effect that the chargor charges the land with the repayment of the money lent or with the payment of the sum, annuity or rent charge intended to be secured, as the case may be. Subsection (2) of the section reads as follows:

- “(2) Such charge when registered shall (subject to any provisions to the contrary therein contained) render the property comprised therein subject to the same security, and to the same powers and remedies on the part of the chargee, as are the case under a legal mortgage of land which is not registered under this Act.”

One of the important points to be decided in this case is the meaning to be given to the expression “legal mortgage” in this subsection. Counsel for the defendant points out that a charge under s. 46 does not involve any transfer of the legal estate in the land the subject of the charge, and that being so he submits that there can be no order of foreclosure. He points to the definition of a suit for foreclosure in para. 2 of s. 67 of the Transfer of Property Act as follows:

- “A suit to obtain an order that a mortgagor shall be absolutely debarred of his right to redeem the mortgaged property is called a suit for foreclosure.”

This definition in turn relates back to the preceding paragraph in which reference is made to “a right to obtain from the court an order that the mortgagor shall be absolutely debarred of his right to redeem the property”. The marginal note to the section is “right to foreclosure and sale”, and it is clear that the right to

foreclosure is the right to obtain such an order as I have mentioned. The section in terms states that “the mortgagee” has the right described to foreclosure or sale: but this generality is qualified by the concluding paragraph of the section which so far as material provides:

“Nothing in this section shall be deemed –

(a) to authorise a simple mortgagee as such to institute a suit for foreclosure . . .”

The reason for this is, according to the submission of counsel for the defendant, that in the case of a simple mortgage there is no transfer of the mortgaged property, and as foreclosure presupposes a right in the mortgagor to “redeem” the mortgaged property, there can be no foreclosure where there has been no transfer and there is nothing to be bought back or redeemed.

The commoner types of mortgage are described in s. 58 of the Act, and in the present context it is sufficient to set out the paragraphs relating to simple mortgages and English mortgages. The former is the subject of para. (b) which reads as follows:

“(b) Where, without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage money, and agrees, expressly or impliedly, that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage-money, the transaction is called a simple mortgage and the mortgagee a simple mortgagee.”

An English mortgage is defined in para. (e) as follows:

“(e) Where the mortgagor binds himself to repay the mortgage-money on a certain date, and transfers the mortgaged property absolutely to the mortgagee, but subject to a proviso that he will re-transfer it to the mortgagor upon payment of the mortgage-money as agreed, the transaction is called an English mortgage.”

Counsel for the defendant submits (and counsel for the plaintiff agrees with him) that the simple mortgage described in para. (b) is equivalent to the English equitable charge, and refers to Halsbury’s Laws of England (3rd Edn.), Vol. 27, p. 371, para. 700, where it is stated:

“Where there is a mere charge, without an express or implied agreement for a legal mortgage . . . the remedy is not by foreclosure but by sale.”

Carrying the argument one stage further, counsel for the defendant submits that a charge under s. 46 is to be regarded as equivalent to a simple mortgage and not to an English mortgage; and it must, I think, be conceded that in accordance with the prescribed form the charge is more akin to a simple mortgage as defined than to an English mortgage, and appears to be on all fours with an equitable charge as described in Cheshire’s Modern Real Property (8th Edn.), at p. 561.

Counsel for the defendant finally submits that sub-s. (1) of s. 100A of the Transfer of Property Act, which gives a chargee under a s. 46 charge, the same rights, powers and remedies as if the charge were an English mortgage to which s. 69 of the Transfer of Property Act applies, is to be construed as conferring no more than the statutory power of sale. He goes on to argue that sub-s. (2) of the same section is subject to the limiting words “except in so far as a contrary intention is expressed or implied” and that in relation to a chargee’s right of foreclosure a contrary intention is implied by reason of the provision in s. 67 which denies the right of foreclosure to a simple mortgagee.

I do not propose to set out at length the argument of counsel for the plaintiff in reply, not because it has not been of great assistance, but because his submissions in the main will be found embodied in my own conclusions on the matters in dispute.

Counsel for the plaintiff takes his stand in the first place on sub-s. (2) of s. 46 of the Registration of Titles Act and secondly on s. 100A of the Transfer of Property Act. As regards the former provision, he submits that the expression “legal mortgage” must be construed as referring to an English mortgage as defined in s. 58 of the Transfer of Property Act, and that the remedies conferred on a chargee by the subsection are those available to an English mortgagee which in terms of the Transfer of Property Act are alternatively a suit for foreclosure, a suit for sale or sale under the statutory power of sale.

The history of s. 46 of the Registration of Titles Act is curious. Originally the section contained no more than the present sub-s. (1). But the section was amended by Ordinance No. 52 of 1933, and from the Objects and Reasons of the Bill it appears that the banks were concerned whether fixtures placed on the land after the execution of a charge were included in the security. A paragraph was accordingly added rendering subject to the security of the charge “the same property as would have been affected by a legal mortgage . . . had the transaction been effected by a legal mortgage instead of by such charge”. A subsection in almost identical terms was added to s. 66 (in reference to a charge by deposit of documents), except that the reference is to an equitable mortgage instead of to a legal mortgage.

In 1961 the worries of the banks appear to have been forgotten, at any rate so far as charges under s. 46 were concerned, and the paragraph introduced in 1933 was repealed (though sub-s. (3) of s. 66 was retained) and the present sub-s. (2) was substituted. The new subsection dealt with an entirely different point, but retained the expression “a legal mortgage” which had been used in the repealed paragraph.

By introducing the references to legal mortgages and equitable mortgages into the 1933 Ordinance, the draftsman appears to have overlooked the fact that basically the law of property in Kenya was the Indian Act, and that under that Act all mortgages are legal mortgages. Admittedly there had been in existence since 1909 the Equitable Mortgages Ordinance, but this solely concerns mortgages or charges by deposit of documents of title. As counsel in this case agree, the nearest equivalent of an equitable mortgage or charge under English law is to be found in a simple mortgage as defined in s. 58 of the Law of Property Act, and such a mortgage under that Act is a legal mortgage. It would appear that the phraseology adopted in the 1933 Ordinance was borrowed from the English law, and so long as the provision was merely concerned with the question what property was to be included in the security, no difficulty could arise. But since the further amendment in 1961 the subsection is concerned with the powers and remedies of the chargee, and if the section is to have any effect it is essential to be able to ascertain what are the powers and remedies arising to the mortgagee under a legal mortgage, so that for the first time it is necessary to ask what is intended by the reference to a legal mortgage. If it is intended to refer to the various kinds of mortgage mentioned in the Transfer of Property Act, the powers and remedies of the mortgagee differ according as the mortgage is a simple mortgage or an English mortgage or some other form of mortgage. If the reference is to the English law, then it must be asked whether it is to the English law pre-1926 or post-1925. The powers and remedies conferred by the 1925 legislation on a legal mortgagee depend on the artificial scheme of mortgages created by that legislation, and can scarcely be relevant to the law of this country. If on the other hand, it is necessary to look at the law as it existed before 1926, it is strange that the law of this country is to be ascertained by reference not only

to the law of another country, but to a law which is already obsolescent in that country. Surely some clearer indication of the intention must be given before such a construction can be adopted.

In view of these uncertainties I do not think any clear meaning can be spelt out of sub-s. (2) of s. 46 of the Registration of Titles Act. Both counsel in these proceedings have sought to rely on it, counsel for the defendant submitting that the legal mortgage referred to is a simple mortgage as defined in the Law of Property Act, and counsel for the plaintiff that the reference is intended to be to an English mortgage. If I had to choose between these two views I should lean in favour of the latter, since it is my understanding that while several different kinds of mortgage are described in the Law of Property Act, the only one in common use in this country is the English mortgage. But even if this was what the draftsman intended, I do not find the intention expressed with sufficient certainty for any reliance to be placed on s. 46 in support of the proposition that the remedy of foreclosure is available to a chargee under the section.

I do not find that the same uncertainties and difficulties arise in the application of sub-s. (1) of s. 100A of the Transfer of Property Act. Under that subsection a chargee has the same rights, powers and remedies as if the charge were an English mortgage to which s. 69 of the Act applies. The limitations contained in the last words are those set out in sub-s. (4) of s. 69 and are of no direct concern in this case. If s. 69 applies, the mortgagee under an English mortgage has a power of sale without the intervention of the court, but this is in addition to the rights of any English mortgagee (whether s. 69 applies or not) which are set out in s. 67, and include the rights of foreclosure and sale by order of the court.

Counsel for the defendant has argued that nothing more is conferred in a charge by virtue of sub-s. (1) of s. 100a except the statutory power of sale, but there is no justification whatsoever for limiting the plain words of the subsection in this way, and if the subsection is to be given any meaning at all it confers the right to come to court and ask for an order for foreclosure or sale.

That being so, it is unnecessary to rely in any way on sub-s. (2) of s. 100A, which is a poorly drafted section, is in very general terms and appears to cover the same ground to some extent at least as the preceding subsection. Nor is there any need to consider the circumstances in which the limitation “except in so far as a contrary intention is expressed or implied” might be held to operate, except to remark that on the construction of the subsection of counsel for the defendant it is difficult to see how it could ever apply to charges executed in accordance with the provisions of s. 46 of the Registration of Titles Act.

With regard to the argument that there can be no foreclosure where there has been no transfer of the property the subject of the charge, counsel for the plaintiff points out in the first place that this is not necessarily true in relation to the English equity of redemption, since foreclosure is a proper remedy where there has been an equitable charge by deposit of title deeds, the ground being that the deposit is treated as a promise by the mortgagor to execute a legal mortgage when called upon to do so, and equity regards that as done which ought to be done. This is, of course, a matter of purely English law, and under the Indian Transfer of Property Act the place of the “equity of redemption” is taken by a legal right to redeem. However, the analogy is of some value since what is in question does not depend on a comparison of legal and equitable rights, but the use of the word “redeem” where no property in fact has passed which the transferor has a right to “buy back”. It is reasonable to argue that in such a case the word “redeem” may be construed in other than a literal sense under the Indian Act as it is so used in English law. This is important in relation to the definition of a suit for foreclosure in s. 67 of the Indian Act and in relation to the similar wording at the end of s. 86 which describes the effect of a decree of foreclosure as being that

the defendant is “absolutely barred of all right to redeem the property”. Such expressions admittedly are more appropriate to an English mortgage where the property has been transferred from the mortgagor to the mortgagee: but there is no need to restrict them to such a case and to a literal construction, especially where another provision of the same Act (viz. s. 100a) in clear terms confers on a chargee under s. 46 of the Registration of Titles Act all the rights, powers and remedies of an English mortgagee, and one of these rights, powers or remedies is unquestionably the right to foreclose. Indeed it is perhaps not without significance that the instrument of charge the subject of these proceedings is expressed to be subject to a “proviso for redemption”.

Counsel for the plaintiff concedes that when the act was amended in 1959 too little attention was given to the machinery by which the additional powers were to be exercised: but he submits with some force that where a substantive right has been conferred by law, the omission of procedural provisions should not be allowed to nullify the right so conferred.

For the reasons given I hold that the plaintiff as chargee under s. 46 of the Registration of Titles Act has by virtue of s. 100a (1) of the Transfer of Property Act a right to bring a suit for foreclosure, and as no defence has been raised except the objection in point of law, there will be an order as prayed, with costs to the plaintiff.

Judgment for the plaintiff. Order accordingly.

For the plaintiff:

Kaplan & Stratton, Nairobi

W. S. Deverell

For the defendant:

A. Jamidar, Nairobi

Musa Misango v Eria Musigire and others
[1966] 1 EA 390 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	29 June 1966
Case Number:	30/1966
Before:	Sir Udo Udoma CJ
Sourced by:	LawAfrica

[1] *Company – Proceedings by member – Member alone can bring proceedings when fraud, ultra vires or personal wrong alleged – Irregular resolutions alleged to deprive plaintiff of his posts – Whether company should be joined as a party.*

[2] *Jurisdiction – Company – Whether member can bring proceedings – Personal wrong to member –*

Ultra vires and fraud alleged.

[3] Practice – Striking out plaint – Whether vague and omitting material facts – Whether frivolous – Meaning of ‘frivolous’ – Civil Procedure Rules, O. 6, r. 29 (U.).

Editor’s Summary

The proceedings disclosed that the plaintiff claimed to be the chairman, a director and the largest single shareholder of a limited company, and that he had been deprived of his offices by special resolutions passed as a result of changes in the articles of the company, which changes were themselves made at meetings convened by members and non-members who had insufficient shares to requisition the meetings or to alter the Articles. He also alleged that false returns had been submitted to the Registrar of Companies. The company was neither co-plaintiff nor co-defendant. The defendants consisted of another director and five non-members. They applied to have the suit summarily dismissed on the

grounds that the plaint disclosed no cause of action; that it was vague and omitted material facts; and that the court had no jurisdiction in proceedings on behalf of the company when brought by a member alone.

Held –

- (i) the suit was not bad under O. 6, r. 29 of the Civil Procedure Rules because a cause of action was disclosed raising serious points of law on the validity of appointment of the company's officers and sufficient facts were pleaded to enable the defendants to appreciate the case they had to meet: the rule only applied to cases that were incontestably bad;
- (ii) the case fell within the exception to the general rule that the court would not interfere with the internal management of a company acting within its powers: a member can, as here, bring proceedings when the acts complained of injure him or are either fraudulent or ultra vires;
- (iii) the company was an essential party and leave was granted at the plaintiff's expense to join the company to prevent the multiplicity of suits.

Application dismissed. Case to proceed with company as a party.

Cases referred to in judgment:

- (1) *Fletcher v. Bethom* (1893), 68 L.T. 438.
- (2) *Attorney-General of the Duchy of Lancaster v. London and North Western Railway Co.* (1892), L.R. 3 Ch.D. 274, C.A.
- (3) *Dyson v. Attorney-General*, [1911] 1 K.B. 410.
- (4) *Foss v. Harbottle* (1843), 2 Hare 461; 67 E.R. 189.
- (5) *Mozley v. Alston* (1847), 1 Ph. 790; 41 E.R. 833.
- (6) *Heyting v. Dupont*, [1963] 3 All E.R. 97; affirmed, [1964] 2 All E.R. 273, C.A.
- (7) *Burland v. Earle*, [1902] A.C. 83.
- (8) *Atwool v. Merryweather* (1867), L.R. 5 Eq. 464.
- (9) *Menier v. Hooper's Telegraph Works* (1874), 9 Ch. App. 350.
- (10) *Simpson v. Westminster Palace Hotel Co.* (1860), 8 H.L. Cas. 712; 2 L.T. 707.
- (11) *Pulbrook v. Richmond Consolidated Mining Co.* (1878), 9 Ch.D. 610.
- (12) *Baillie v. Oriental Telephone and Electric Co. Ltd.*, [1915] 1 Ch. 503.
- (13) *Normandy v. Ind Coope and Co. Ltd.*, [1908] 1 Ch. 84.
- (14) *Brown v. British Abrasive Wheel Co.*, [1919] 1 Ch. 290.

Judgment

Sir Udo Udoma CJ: The plaintiff in this suit is a director and chairman of the Luwero Coffee Growers and Curers Ltd. – a limited liability company incorporated in Uganda. The first defendant is a director of the said company. The second to the sixth defendants are simply citizens of Uganda.

This is an application by summons taken out by the defendants for an order of this court dismissing this suit summarily on three grounds, namely:

- (1) under O. 6, r. 29 of the Civil Procedure Rules, because the plaint does not disclose a cause of action;
- (2) because the reliefs and remedies claimed in the plaint are not maintainable at the instance of the plaintiff, as the court has no jurisdiction to try the suit as framed; and
- (3) under O. 15, r. 5 of the Civil Procedure Rules for want of prosecution.

In support of the first ground of the application, counsel for the defendants submitted that the plaint filed does not disclose a cause of action because it is vague and the complaint of the plaintiff, as pleaded in para. 7 of the plaint, not

clearly stated. Counsel for the defendants contended that the averment of non-qualification in terms of the provisions of s. 132 of the Companies Ordinance of the requisitionists, who convened the meeting of the company held on December 20, 1965, referred to in para. 6 of the plaint, was erroneous and without foundation as the requisitionists of the said meeting were duly qualified. It was further contended that para. 7 of the plaint was defective in that it failed to plead all material facts and also failed to disclose sufficient particulars to enable the defendants to know what case they have to meet. In particular, the paid up capital of the company, it was submitted, ought to have been pleaded and the names of the requisitionists of the meeting of December 20, 1965 and those requisitionists and non-members of the company, who attended the said meeting ought also to have been disclosed; and that it was not enough to aver in the plaint that the meeting was an unlawful one.

For the proper appreciation of the objections raised by the defendants to the plaint filed, it is, I think, necessary to set out verbatim hereunder paras. 3, 4, 5, 6, 7, 8 and 9 of the plaint, which I consider contain the gravamen of the plaintiff's case against the defendants, and also paras. 3, 4, 5, 6, 7, 8, 9 and 10 of the written statement of defence filed in answer thereto.

“Plaint

3. On August 27, 1965 the first defendant submitted Comp. Form 8 to the Registrar of Companies as per photostat copy attached hereto marked ‘P1’.
4. There had taken place no special general meeting of the company on August 20, 1965 and no board of directors’ meeting had taken place on August 21, 1965 as alleged in that return and the alleged appointments of Messrs. Mugerwa and W. Kabugo as directors and L. S. Nyamanka as secretary had not in fact taken place.
5. On December 22, 1965 the first defendant submitted another Comp. Form No. 8 to the Registrar of Companies as per photostat copy thereof attached hereto marked ‘P2’.
6. The plaintiff will contend that the said Wilson Kabugo, Safasi Mugerwa, Israil Kalibbala, Yozefu Nviri, and Sezi Kasule were not lawfully elected directors of Luwero Coffee Growers & Curers Ltd.; and that Leonard S. Nyamanka was not lawfully appointed secretary of the said company since the special general meeting of the said company alleged to have been held at Kiwumpa, Bulemezi, on December 20, 1965 at which they are alleged to have been appointed was not convened according to law.
7. The said meeting was convened by so-called requisitionists under s. 132 of the Companies Ordinance, but the plaintiff will contend that the requirements of the said section of the Companies Ordinance were not complied with in that the said requisitionists did not hold one-tenth of the paid-up capital of the company which carried the right of voting at general meetings of the company and most of them were actually non-members of the company and that therefore the requisition was null and void and of no legal effect whatever.
8. At that meeting three special resolutions were passed, namely –
 - (a) that art. 48 (a) be changed to read: ‘48 “Each member shall have one vote irrespective of shares held by him”.’
 - (b) that art. 53 be changed to read: ‘53 (a) “The qualification of a director shall be holding two shares in the company”.’
 - (c) that art. 37 (a) be changed to read: ‘37 “Any director or the board of directors may convene an extraordinary or annual general meeting of the company”.’

A photostat copy of these resolutions is attached hereto marked 'P3'.

9. The plaintiff contends that these resolutions are invalid as the meeting at which they were passed was not lawfully convened."

Paragraphs 3, 4, 5, 6, 7, 8, 9 and 10 of the statement of defence are as follows:

"Written Statement Of Defence

3. In The Alternative but without prejudice to the foregoing SAVE as is hereinafter unless expressly admitted, defendants, deny each and every allegations of fact and law contained in the plaint as if they were set forth herein seriatim and each expressly traversed.
4. Defendants admit paras. 1 and 2 of the plaint.
5. Paragraphs 3 and 4 of the plaint are unnecessary, scandalous and tend to prejudice, embarrass or delay fair trial of the action as such they ought to be struck out.
6. Defendants admit para. 5 of the plaint.
7. The persons named in para. 6 of the plaint are lawfully and duly elected and appointed as directors and secretary respectively of the Luwero Coffee Growers and Curers Ltd. at an extraordinary general meeting duly convened and held on December 20, 1965 as required by s. 132 of the Companies Ordinance, 1958.
8. Defendants contend that the aforesaid meeting was held and convened by requisitionists or persons holding at least one-tenth of the paid-up capital of the company carrying right to vote at the general meetings of the company as provided by s. 132 of the Companies Ordinance, 1958 and deny further that any of the requisitionists were non-members of the company and deny that the requisition was null and void and of no legal effect.
9. Defendants admit that resolutions as mentioned in Annexure 'P3' to the plaint were passed at the aforesaid meeting of the company.
10. Defendants deny allegations contained in para. 9 of the plaint. The said resolutions are valid having been passed at a meeting duly held and convened."

It is to be noted that the averments in paras. 3 and 4 of the plaint that the first defendant had on August 27, 1965, submitted to the Registrar of Companies Form 8, which was false in that the said form falsely alleged that a special general meeting and a meeting of the board of directors of the Luwero Coffee Growers and Curers Ltd. had taken place on August 20, 1965, and August 21, 1965, respectively, when, no such meetings were in fact held. In paras. 5, 6, 7 and 8 of the plaint, it is alleged that the special general meeting of the company aforesaid, purported to have been held on December 20, 1965, was unlawful for non-compliance with the provisions of s. 132 of the Companies Ordinance, 1958 by the requisitionists and conveners of the said meeting and that the special resolutions passed thereat were invalid.

The relief claimed falls under three heads, namely:

- (1) a declaration that the business transacted at the unlawful meeting was null and void;
- (2) an injunction to restrain the defendants from acting on the resolutions passed at the illegal meeting;
- (3) an order directed to the Registrar of Companies for the rectification of the company's register.

Now, the defendants' submission is that the plaint does not disclose a cause of action and should be dismissed under O. 6, r. 29 of the Civil Procedure Code. I am of opinion that on the face of the pleadings filed and the averments

therein made and traversed this submission is not well founded. I think it is misconceived.

As I understand it, the contention of the defendants in substance amounts to this: that because para. 7 of the plaint is vague (which is not the case), and sufficient particulars relating to paid-up capital of the company had not been pleaded and the names of the requisitionists of the alleged unlawful meeting of December 20, 1965 have not been disclosed, therefore the plaint does not disclose a reasonable cause of action. That contention I cannot accept.

It is elementary that under O. 6, r. 1 of the Civil Procedure Rules, to which the court was referred by counsel for the defendants, “every pleading shall contain, and contain only, a statement in a concise form of the material facts on which the party pleading relies, but not the evidence by which they are to be proved”. The paid-up capital of the company involved in this case and the names of the requisitionists of the meeting of December 20, 1965 and of those members and non-members of the company, who attended the said meeting are, I agree with counsel for the plaintiff, mere particulars, which the defendants could have obtained by application to the plaintiff. Such particulars, if pleaded might be regarded by some as evidence depending, however, on how they are pleaded. There is also the question of prolixity of pleading to be considered.

I do not think the court would be justified in holding that because the paid-up capital of the company has not been pleaded and the names of members and non-members of the company, who took part in a meeting alleged to be illegal are not disclosed in the plaint, therefore the plaint does not disclose a reasonable cause of action and should be dismissed under the provisions of O. 6, r. 29 of the Civil Procedure Rules. On the contrary, I am satisfied that it would be unreasonable to so hold in the circumstances of the instant case. I hold that the pleadings in this case have raised important points of law fit for determination by this court. There is the serious allegation of non-compliance with the provisions of s. 132 of the Companies Ordinance and of the submission to the Registrar of Companies of Form 8, the contents of which are false. Furthermore, an examination of both the plaint and the statement of defence discloses that by their pleading the defendants have joined issues with the plaintiff on the points of law raised. The defendants, having put the points of non-compliance with the provisions of s. 132 of the Companies Ordinance and the validity of the appointment of the officers of the companies in issue, cannot now be heard to say that the points are such which ought not to be tried by this court.

On the objection that the plaint does not disclose a cause of action and should be dismissed, it may be instructive to refer to and examine certain English authorities in order to ascertain the principles upon which such an objection can be sustained.

In *Fletcher v. Bethom* (1), in which the circumstances of the objection raised with reference to the stage of the proceedings in that case were not dissimilar to those present in the instant case, it was held that certain defendants therein named, having put the point objected to in issue by their defence, could not be allowed to say that it was one which ought not to be tried in issue at all.

Attorney-General of the Duchy of Lancaster v. London and North Western Railway (2) was an action brought in the county Palatine Court for the purpose of asserting Her Majesty’s claim to certain lands alleged to be part of the Duchy of Lancaster, which had been taken by the defendants. The defendants appeared; but before putting in any defence, they moved to stay the proceedings in the action on the following grounds: first, that the Palatine Court had no jurisdiction to entertain the action in any proceedings in the matter; secondly, that if the court had jurisdiction the Attorney-General of the Duchy was not a proper plaintiff to institute the proceedings; and thirdly, that the proceedings ought to

have been in the form of an information, and not an action. The motion was made under O. 24, r. 4 of the Chancery of Lancaster Rules, 1884, which is the same as O. 25, r. 4 of the Rules of the Supreme Court of England. The vice-chancellor held that he had no jurisdiction to strike out the statement of claim or stay the action under the rule, no defence having been filed, and the action not being on the face of the statement of claim frivolous or vexatious, but raising an important point of law. He accordingly dismissed the motion. The defendants thereupon appealed from his decision. On appeal, it was held by the Court of Appeal that applications under O. 25, r. 4, to strike out pleadings or stay proceedings on the ground that the pleadings disclose no reasonable cause of action or defence, are not intended to supply the place of demurrers except in frivolous cases, and the court will not entertain such an application if the pleading raises an important point of law.

In *Dyson v. Attorney-General* (3) it was held by the Court of Appeal that O. 25, r. 4 which enables the court or the judge to strike out any pleading on the ground that it discloses no reasonable cause of action was never intended to apply to any pleading, which raises a question of general importance or serious question of law. In his speech in that case, Fletcher Moulton, L.J., said ([1911] 1 K.B. at pp. 418-419):

“Now it is unquestionable that, both under the inherent power of the court, and also under a specific rule to that effect made under the Judicature Act, the court has a right to stop an action at this stage if it is wantonly brought without the shadow of an excuse, so that to permit the action to go through its ordinary stages up to trial would be to allow the defendant to be vexed under the form of legal process when there could not at any stage be any doubt that the action was baseless. But from this to the summary dismissal of actions because the judge in chambers does not think they will be successful in the end lies a wide region, and the courts have properly considered that this power of arresting an action and deciding it without trial is one to be very sparingly used, and rarely, if ever, excepting in cases where the action is an abuse of legal procedure. They have laid down again and again that this process is not intended to take the place of the old demurrer by which the defendant challenged the validity of the plaintiff's claims as a matter of law . . . To my mind it is evident that our judicial system would never permit a plaintiff to be ‘driven from the judgment seat’ in this way without any court having considered his right to be heard except in cases where the cause of action was obviously and almost incontestably bad.”

It should be observed that O. 6, r. 29 of the Civil Procedure Rules of this court is a verbatim reproduction of O. 25, r. 4 of the Rules of the Supreme Court of England.

I pass on to deal with the second objection, which I consider raises a more complex and difficult problem, namely, that the reliefs and remedies claimed in the plaint are not maintainable at the instance of the plaintiff as the court has no jurisdiction to entertain them. It was submitted by counsel for the defendants that on the authorities of *Foss v. Harbottle* (4), *Mozley v. Alston* (5) and *Heyting v. Dupont* (6) the court has no jurisdiction to entertain this suit because the plaintiff is not entitled to the relief which he seeks and that the proper plaintiff in this suit ought to be the company itself.

This submission was opposed by counsel for the plaintiff, who contended that on the authority of *Burland v. Earle* (7) the action was maintainable by the plaintiff in his own right. Counsel also submitted that in para. 1 of the plaint (which has been admitted) the plaintiff is described as director and chairman of the Luwero Coffee Growers and Curers Ltd. But that was before the meetings

alleged to have been held on August 20 and 21, 1965 and December 20, 1965 and that on the face of the two Forms 8 filed by the defendants with the Registrar of Companies, the plaintiff has been removed from both offices. The plaintiff is not even shown as a shareholder on the said forms. Counsel further submitted that the amendment of art. 48 (a) of the company (attachment P3 to the plaint) to read:

“48. ‘Each member shall have one vote irrespective of the shares held by him’”

instead of the original art. 48 (a) which read: “Each member shall have one vote for every share held by him”, was a device to have the plaintiff removed and to defeat his control of the activities of the company; and that by the purported amendment of the article he has been deprived of his rights even though he is the largest single shareholder in the company. He has lost his post of director and of chairman and has been excluded from the exercise of the rights to which he is entitled under those offices. Counsel submitted that indeed in Form 8 (P2) he is shown as having ceased to be director. But it is not stated how that had been brought about. Counsel therefore contended that the plaintiff was illegally removed by non-qualified members and even non-shareholders of the company. I propose to examine these submissions in the light of the authorities to which the court has been referred.

It is an elementary principle of the law relating to joint stock companies that the court will not interfere with the internal management of companies acting within their powers, and, in fact, has no jurisdiction to do so. It is also clear law that in order to redress a wrong done to the company or to recover moneys or damages alleged to be due to a company, action should prima facie be brought by the company itself. These were the cardinal principles laid down in *Foss v. Harbottle* (4) and *Mozley v. Alston* (5).

On the authorities of these two cases, it is true that as a general rule a suit by an individual shareholder or individual shareholders in an incorporated company, complaining of an injury to the corporation, cannot be maintained, if it appears that the plaintiffs have the means of procuring the suit to be instituted in the name of the corporation itself. This principle was cited with approval and applied in *Heyting v. Dupont* (6) referred to above, judgment in which was affirmed by the Court of Appeal. There the plaintiff, Heyting, a minority shareholder of the company, brought an action suing personally and on behalf of himself and all other shareholders except the first defendant, who was the majority shareholder, against the first defendant and the company. The relief claimed in so far as the same is relevant to the issue under consideration in the instant case, was payment of damages by the first defendant to the company for misfeasance as a director. The plaintiff and the first defendant were sole directors of the company. The statement of claim did not allege ultra vires, nor fraud, on the part of the first defendant, nor any material appropriation of assets by him in fraud of the minority, but did allege that it was impossible for the company to bring an action in its own name against the first defendant. There was also a counterclaim by which, mutatis mutandis, the first defendant alleged similar representative claims. At the trial the court proprio motu raised as a preliminary issue the question of jurisdiction to try the representatives' claims and counterclaims. The issue was argued before the court as a preliminary point of law, although neither side was enthusiastic about it, for a decision that the court had no jurisdiction would affect both sides. The court, having taken time to consider the matter, held that it was its duty to adjudicate on the question whether there was jurisdiction to try the representatives' claims, although the parties desired that the action should be tried; in the circumstances the representative claims

by the plaintiff fell within the principles stated in *Foss v. Harbottle* (4), with the consequence that there was not jurisdiction to entertain them. The position with regard to the counterclaim was a fortiori, and the action and counterclaim, therefore, proceeded only in relation to the personal claims.

To the general rule, that in order to redress a wrong done to a company or to recover moneys or damages alleged to be due to the company, action should prima facie be brought by the company itself, there are, of course, certain exceptions. Some of these exceptions were conceded by counsel for the defendants. One such exception was dealt with in *Burland v. Earle* (7), above referred to, in which the principle was stated that, although a company must sue to redress a wrong done to it, if a majority of its shares are controlled by those against whom relief is sought, the complaining shareholders may sue in their own names, but must show that the acts complained of are either fraudulent or ultra vires. See also *Atwood v. Merryweather* (8).

In *Menier v. Hooper's Telegraph Works* (9) it was held that the majority of shareholders in a company have no right to use their votes in such a way as to compromise a suit instituted for the benefit of the company and to retain the benefits obtained by the compromise for themselves to the exclusion of the minority. Where an attempt is made to do so by the majority of shareholders, a bill filed by a shareholder on behalf of himself and the other shareholders to enforce the rights of the minority, would be entertained. In *Simpson v. Westminster Palace Hotel Co.* (10) the view was expressed by Lord Campbell, L.C., that the funds of a joint stock company established for the purposes of one undertaking cannot be applied to another. If an attempt to do so is made, such an attempt would be ultra vires, although sanctioned by all the directors, and by a large majority of the shareholders; therefore any single shareholder has a right to resist it and the court of equity will interpose on his behalf by injunction.

In *Pulbrook v. Richmond Consolidated Mining Co.* (11) it was held that a director of a company can, if qualified, sustain an action in his own name against the other directors on the ground of individual injury to himself, for an injunction to restrain them from wrongfully excluding him from acting as a director. That was a motion to restrain the directors of the defendant company from restraining or in any way interfering with the plaintiff's acting as a director of the company. On August 23, 1877, the plaintiff, whose name appeared on the register of the company as the holder of 100 shares in the capital of the company of the nominal value of £500, was elected a director. Prior to his election, in January, 1877, the plaintiff had executed a deed of transfer of his shares to one William Cuthbert as he alleged, by way of mortgage as a security for money borrowed on his shares, and it was agreed between them that the transfer should not be registered. On January 18, 1878, Cuthbert, through mistake as alleged by the plaintiff, took the transfer to the secretary of the company who registered the same and inserted Cuthbert's name as the holder of the shares, transferred to him by the plaintiff. Notice of this entry on the register having been given to the directors, the plaintiff was not allowed to take his seat at the board. The plaintiff thereupon took out a summons on the Common Pleas Division to rectify the register and by an order of the court of March 1, 1878, the name of Cuthbert was ordered to be struck out as the transferee of the said shares and the name of Pulbrook inserted as the holder of the same. On June 25, 1878, the plaintiff took his seat at the board and produced the order, but the directors refused to permit him to act. Thereupon he brought his action against the company and the other directors. The motion, which was made to restrain the directors by injunction from thus interfering with his rights, succeeded and the injunction was granted. In his judgment, Jessel, M.R., said (9 Ch.D. at pp. 612-613):

“This is a motion which raises some point of great importance. The first question is whether a director who is improperly and without cause excluded by his brothers from the board from which they claim the right to exclude him, is entitled to an order restraining his brothers from so excluding him. In this case a man is necessarily a shareholder in order to be a director and as a director he is entitled to fees and remuneration for his services and it might be a question whether he would be entitled to the fees if he has been excluded. Now, it appears to me that this is an individual wrong, or a wrong that has been done to an individual. It is a deprivation of the legal rights for which the directors are personally and individually liable. He has a right by the constitution of the company to take a part in its management, to be present, and to vote at the meeting of the board of directors. He has a perfect right to know what is going on at these meetings. It may affect him individually, as a shareholder, as well as his liability as a director and as it has been sometimes held that even a director who does not attend board meetings is bound to know what is done in his absence.

It appears to me that the injury or wrong done to him by preventing him from attending board meetings by force, he has a right to sue. He has what is commonly called a right of action, and these decisions which say that, where a wrong is done to the company by the exclusion of a director from the board meetings, the company may sue, and must sue for that wrong, do not apply to the case of a wrong done simply to an individual.”

Baillie v. Oriental Telephone and Electric Co. Ltd. (12) was a case in which the directors of the Oriental Telephone and Electric Co. Ltd. (hereinafter to be referred to as “O company”) were also directors of a subsidiary company in which the O company held practically the whole of the shares. In 1907, the directors, in exercise of the voting powers of the O company in the subsidiary company, obtained the passing of resolutions whereby the articles of association of the subsidiary company were altered so as to increase the fixed remuneration of the directors and also to give them a percentage of the net profits. In 1913, the auditors of the O company drew attention to the fact that the receipts by the directors of remuneration in the capacity as directors of the subsidiary company ought to be sanctioned by the shareholders. An extraordinary general meeting of the shareholders of the O company was then convened by the directors with the object of passing special resolutions ratifying what had been done by the directors in 1907, authorising them to retain all remuneration received and to be received by them as directors of the subsidiary companies, without being accountable for the same, and to exercise the voting powers conferred by them in such companies as they thought fit. The notice convening the meeting was accompanied by a circular. The notice set out the proposed resolutions, but neither the notice nor the circular gave particulars as to the amount (which was very large) of the remuneration which had been received by the directors in respect of the subsidiary company. The resolutions were passed by the requisite majority and subsequently confirmed. In an action by a shareholder on behalf of himself and all the other shareholders of the O company, for a declaration that the resolutions were not binding on the ground of insufficient notice of the meeting at which they were passed, and for an injunction to restrain the company and the directors from acting upon them, the plaintiff moved for an interim order. Astbury, J., following *Normandy v. Ind Coope and Co.* (13) and on the principle of *Foss v. Harbottle* (4) dismissed the motion on the ground that the plaintiff had no right to sue on behalf of himself and the other shareholders without joining the company as plaintiff. On appeal, it was held that the action was maintainable by the plaintiff; that the notice did not give a sufficiently full and frank disclosure to the shareholders of the facts upon which they were asked to vote; and that the resolutions were invalid and not binding upon the company.

In *Brown v. British Abrasive Wheel Co.* (14) a company was in great need of further capital. The majority, representing ninety-eight per cent. of the shareholders, were willing to provide this capital if they could buy off the two per cent minority. Having failed to affect this by agreement, the majority proposed to pass an article enabling them to purchase the minority shares compulsorily on certain terms therein mentioned, but were willing to adopt any other mode of ascertaining the value that the court thought fit. It was held that in the circumstances, the proposed article was not just and equitable or for the benefit of the company as a whole, but was simply for the benefit of the majority. It was not, therefore, an article that the majority could force on the minority under s. 13 of the Companies (Consolidated) Act, 1908.

It is noteworthy that s. 13 of the Uganda Companies Ordinance No. 1 of 1958 under which the defendants had purported to act in altering the articles of the company complained of is a verbatim carbon copy of s. 13 of the English Companies (Consolidated) Act, 1908. It should also be mentioned that throughout the submissions made by the counsel for the defendants, there was no suggestion whatsoever that the articles purported to have been amended were done for the benefit of the company as a whole. On the contrary, the plaintiff's complaint is that by the amendment of art. 48 in particular, he had been deprived of his right to which he was entitled by reason of the number of shares held by him in the company.

On this head of the objections raised, therefore, I conclude that I am satisfied that this suit is maintainable in law by the plaintiff in his own right, and that this court has jurisdiction to entertain it as the action is brought for injury done to the plaintiff personally by his co-directors and other members of the company.

In coming to that conclusion, I have given thoughtful consideration to the facts and circumstances disclosed in the pleading as well as in the submission, which facts and circumstances are set out hereunder and the principles enunciated in the various authorities already referred to herein, the result of considerable research. Such facts and circumstances include:

- (1) The averments pleaded in paras. 1 and 2 of the plaint, which have been admitted by the defendants, to the effect that the plaintiff is a director and chairman, and the first defendant a director only of the Luwero Coffee Growers and Curers Ltd.; and that the second to the seventh defendants are mere citizens of Uganda. The averments contained in paras. 7 and 8 of the plaint, which have been traversed, that the special resolutions complained of were passed by a mixed crowd of members and non-members of the company.
- (2) The allegation contained in paras. 3, 4 and 5 of the plaint that the forms submitted to the Registrar of Companies contained false statements of fact; and in paras. 4, 6 and 7 of the plaint that the meetings therein pleaded were requisitioned and convened in contravention of s. 132 of the Companies Ordinance.
- (3) The statement made at the Bar by the counsel for the plaintiff, which was not refuted by counsel for the defendants, that the effect of the special resolutions was to deprive the plaintiff of his chairmanship and directorship of the company and that his personal right has been infringed and he is damnified thereby. These statements, however, have not been pleaded in the plaint, but have been materially corroborated and reinforced by the two Form 8 (P1 and P2) filed with the Registrar, none of which contains the name of the plaintiff as director or chairman. On the contrary, in Form 8 (P2) it is specifically stated that the persons therein named were appointed as directors to replace the plaintiff and

five other directors, one of whom was dead, as a result of a dispute among the directors.

It may also be mentioned that the plaintiff has not joined the company as a defendant in this suit. This is a serious omission having regard to the relief claimed which, if granted, might affect the company itself. When the attention of the counsel for the plaintiff was called to this omission, he indicated that he had intended to apply for leave to amend the plaint in that respect as he himself appreciated the seriousness of the omission. He therefore applied for leave to so amend. The application for leave to amend the plaint was objected to by counsel for the defendants, as he was entitled to do. But I am satisfied that the defendants would in no way be damnified or embarrassed or prejudiced by such an amendment, and counsel for the defendants not having indicated that he was acting for the company as well, I think the plaintiff should be granted leave to amend his plaint. I am also of the view that such an amendment is necessary in the interests of justice as it would avoid multiplicity of suits and enable all matters in controversy between the parties to be determined once and for all. Leave is therefore granted to the plaintiff to amend the plaint as desired, such amended plaint to be filed in this court within fifteen days from the date hereof. The defendants to be at liberty also to amend their defence, if they so desire, within fifteen days from the date of service of the plaint. I have taken this course because counsel for the defendants has himself admitted at the Bar that the affairs of the company leave much to be desired, as the directors spend most of their time quarrelling among themselves; and do not seem to understand the requirements of such mundane things as the company's ordinance in respect of the keeping of proper records and other books.

As regards the third head of objection raised under O. 15, r. 5, it is not necessary to examine it in detail. The point, moreover, was not seriously pressed by counsel for the defendants, who conceded that it was a matter within the discretion of the court. The application to set down the case for hearing was only fifteen days late. In the circumstances, I think the defendants will be amply compensated by costs.

On the objections raised, my conclusion is that they should be over-ruled and I accordingly over-rule them and order that the hearing of this suit be proceeded with after the filing of the pleadings as ordered. The costs of this ruling and of the adjournment of this suit must go to the defendants. Order accordingly.

Application dismissed. Case to proceed with company as a party.

For the plaintiff:

J. C. Patel, Kampala

B. K. M. Kiwanuka

For the defendant:

Kiwanuka & Co., Kampala

J. C. Patel

Gian Singh Panesar and Others v Lochab and another
[1966] 1 EA 401 (HCK)

Division: High Court of Kenya at Nakuru

Date of judgment: 8 December 1965

Case Number: 87/1964
Before: Trevelyan J
Sourced by: LawAfrica

[1] Negligence – Damages – Motor car accident – Unlit lorry parked on side of road – Collision with car using the road – Claim for damages for injuries suffered – Award of damages for multiple injuries and disfigurement – Contributory negligence by driver of other vehicle – Whether claim of passengers affected by such negligence.

[2] Nuisance – Damages – Motor car accident – Collision with unlit parked lorry – Claim for damages for injuries suffered.

Editor's Summary

The plaintiffs were travelling in a saloon car driven by the first plaintiff when it collided with a stationary lorry belonging to the first defendant. The second defendant, who was the first defendant's employee, had parked the lorry on the side of the road with its nearside wheels off the road on the murrum and the offside wheels on the tarmac. It was conceded by the second defendant that he had parked the lorry at about 7.30 p.m. and that though he had switched on the side lights he knew that the battery was almost flat and that the lights would not last much longer than about midnight. The collision took place later that night. According to the first plaintiff when he approached the lorry he was doing approximately forty to forty-five m.p.h., the lights of the lorry were not on and its reflectors were not reflecting, and though he tried to avoid the collision he could not do so owing to the sudden appearance of the unlit lorry. There was, however, evidence that another motorist doing about thirty-five m.p.h. saw the unlit stationary lorry and passed it without hitting it. As a result of the collision the plaintiffs received injuries in varying degrees and they now brought an action claiming damages based on nuisance and negligence. The defence claimed that the collision occurred through the sole negligence of the driver of the saloon car, or alternatively that there was contributory negligence.

Held –

- (i) placed where it was, and in the condition that it was, the lorry constituted a real threat and danger to users of the road, and both nuisance and negligence had been established;
- (ii) the first plaintiff was travelling too fast in the conditions in which he found himself and was not keeping a proper look-out; he drove negligently and contributed to the accident;
- (iii) there is no rule of law that when you drive at night you must be able to pull up well within the limits of your lights; it was a question of fact in each case;
- (iv) in the instant case the parties were to blame equally; this finding affected the first plaintiff only for the passengers in the saloon car were not identified with their driver's negligence.

Judgment for the plaintiffs. Award for damages accordingly.

Cases referred to in judgment:

- (1) *Chumboo Chunder Chowdhry v. Modhoo Kybert* (1867), 10 Ind. W.R. 1869.

- (2) *Cromarty v. Monteith* (1957), 8 D.L.R. 112 (Canada).
- (3) *Slater v. Worthington's Cash Stores* (1930), Ltd., [1941] 3 All E.R. 28.
- (4) *Trevett v. Lee*, [1955] 1 All E.R. 406.

- (5) *Fisher v. Ruislip – Northwood U.D.C. and County Council of Middlesex*, [1945] 2 All E.R. 458.
- (6) *Ware v. Garston Haulage Co. Ltd.*, [1943] 2 All E.R. 558.
- (7) *Morris v. Luton Corporation*, [1946] K.B. 114; [1946] 1 All E.R. 1.
- (8) *Harvey v. Road Haulage Executive*, [1952] 1 K.B. 120.
- (9) *Lampert v. Eastern National Omnibus Co. Ltd.*, [1954] 2 All E.R. 719.
- (10) *Paolo Cavinato v. Vito-Antonia di Filippo*, [1957] E.A. 535 (C.A.).
- (11) *Baggot v. Pinguey*, [1961] C.L.Y. 2341.
- (12) *Randle v. Hands* (unreported).
- (13) *Pickering v. White*, [1955] C.L.Y. 741.

Judgment

Trevelyan J: This is a suit in which six members of the Panesar family claim damages from two defendants as a result of a collision which occurred on the night of August 29-30, 1963. The family was returning from Nairobi in a Morris Oxford saloon car, registration No. KBB-386. It collided with the rear off-side corner of the cross-beam of a stationary Austin lorry, registration No. KJC-566, then belonging to Mr. Lochab (the first defendant) which had been parked where it was by Mr. Tebeta (the second defendant) who was its driver and in his employ at the time. The claim is raised on the twin foundations of nuisance and negligence and is denied. The defence claim that the collision occurred through the sole negligence of whoever it was that was driving the car. Alternatively that there was contributory negligence.

Mr. Panesar (the first plaintiff) was driving the car. The defence say that by inference from the facts it was his wife Tej Kaur (the second plaintiff) who was driving but she does not know how to drive, has never tried to drive and was not driving. She was sitting beside her husband. On her lap was her son Guriqbal (the sixth plaintiff). On her left was her son Satwinder (the fifth plaintiff). In the back was Balbir Kaur (the fourth plaintiff) and daughter of Mr. and Mrs. Panesar. On her lap was her brother Gurchan (the third plaintiff). Mr. Lochab says that at 8 a.m. the following morning he saw a pool of blood about two feet wide in front of the lorry. His son Naranjan Singh said “I did not care to see it”, but did not care to specify what “it” was. The defence say that as Mr. Panesar alone of the passengers fell out of the car and it was the rear near-side door which was ripped off, that is the door out of which he must have fallen. Therefore he could not have been driving, and, as blood was in front of the lorry, that is where he fell. I do not believe that there was a pool of blood. This was a matter of some importance to the defence. They should have asked the police officer Mr. Bidmead about it, but did not. He was at the scene five-and-a-half hours before Mr. Lochab. He would or should have been able to see the blood if it was there. But if the blood was there it does not mean that Mr. Panesar fell out of the back door. The off-side of the car was also damaged. The driver’s door was intact but could not be closed properly. This suggests, does it not, that it opened at some time? That was the door out of which he fell. Balbir Kaur told us that she was sitting on the back seat and “It was due to my good luck I did not fall out”. I believe her though I have not failed to bear in mind that if the car swung to the right the passengers would have swung to the left. But there was not much of a swing. The fact that the child Gurchan was sitting on Balbir’s lap and suffered the greatest injury is at least a matter for consideration. I accept the evidence of

the various occupants of the car as to where the six of them were sitting in it at the time of the accident and where Mr. Panesar was found when it was realised that he was missing.

I now make my assessments of the relative credibility of the witnesses. Counsel found it no easy matter to get direct answers from some of them. Mr. Panesar

was not a witness of complete truth. He was content to overstate his case and to shift his ground as might be required. One may point to what he said about the time of the incident and the state of his tyres. He was unwilling to answer the simplest of questions directly. Mr. Wood is an expert in his sphere. I accept his evidence and opinions in their totality. Mr. Bidmead is also an expert in his sphere. I accept his evidence and opinions too though I would independently have reached the same views. His calculation as to the width of the road was slightly incorrect. Tej Kaur gave a fair account of the journey but overstated her present condition. She is illiterate and does not really know what an “injury” is. Balbir Kaur and Satwinder gave truthful evidence. Mr. Mwangi had no reason to be partisan: and was. His evidence about where the lorry was parked was wrong. He insisted, and persisted, in moving it further into the middle of the road. But his evidence was otherwise substantially true. Mr. Mehenga Singh was the best of the witnesses intimately concerned with the case. A relative of the plaintiffs, he gave objective evidence of a high order and complete truth. Mr. Lochab was not a convincing witness nor was he anxious to assist in the ascertainment of a just decision. One may refer to the fashion in which he answered questions, particularly those relating to whether he had ever been convicted of operating defective vehicles. Mr. Naranjan Singh was evasive; particularly in regard to the issue of the pool of blood. The suggestion that one cannot become unconscious unless one gets a “bang on the head” I do not accept in the absence of medical evidence.

Mr. Lochab knows little enough about his vehicles. He leaves their maintenance to his sons. But why was the lorry parked where it was with its greater part on the road? Why was it not in its accustomed place on the farm? It was close enough to it. Indeed a portion of the farm abutted on to the road no more than 100 yards away. The second defendant made a statement to the police and pleaded guilty to a charge of leaving the lorry where it was. This evidence went in by consent though it could in any event have gone in as admissions (*Chumboo Chunder Chowdhry v. Modhoo Kybert* (1)), but might be rebutted: *Cromarty v. Monteith* (2). In the statement the second defendant admits “parking” the lorry at about 7.30 p.m. He said:

“I placed the vehicle with the near-side wheels just on the murram part of the road and the off-side wheels on the tarmac road. When I left the vehicle I switched on the side lights but I knew the battery was almost flat and that they would not last much longer than about 12 midnight.”

This suggests that he considered lighting to be required, that the reflectors were not enough and that from about midnight there would be no lights. When charged he said:

“About the battery, I reported to the owner of the lorry. The lorry broke down on the road. I knew that it could cause damage to other vehicles and I tried to clean the reflectors up. I knew that the battery was very low and would not last during the hours of darkness.”

We heard a fair amount about lights and reflectors but in the other place upon charge he said (a) that the vehicle broke down (b) that he knew it could cause damage to other vehicles and (c) not that he cleaned the reflectors but that he tried to do so. Quite what that means is not clear. I could suggest that he had no means, or no proper means, of cleaning them or that for some reason or other the operation was not or could not be successful. But what is not in doubt is that he was content to admit, as a matter which might aggravate rather than mitigate sentence, that the lorry “could cause damage to other vehicles”. There was

nothing to have stopped him from parking the lorry wholly off the road and out of danger's way. Why was this not done?

Mr. Naranjan Singh says that he checked the lorry in his garage earlier in the day and found the battery and lights to be in order. I do not believe it and it was not the view of the second defendant. The vehicle, says Mr. Singh, was used that day to transport timber from farms after which it was brought into his garage at Eldoret. He first said that the lorry filled up with diesel oil in the garage. Then it transpired that the diesel pump was at the farm. Came these exchanges:

“Q. – Why on that day was it parked on the main Eldoret road? A. – I do not know but the driver was telling us the road to the farm was in a very bad condition so he parked the vehicle on the road. Q. – When did he tell you this? A. – Next day. After the accident. The driver made no complaint about the battery that day.”

I do not believe it. The driver was told to go to the farm to fill up with diesel oil. He drove the lorry to within 100 yards of the farm; perhaps a quarter of a mile from its entrance. He was to fill the vehicle up ready for the morrow's work. It is not suggested that the lorry was not in its accustomed place the previous night. What made the road to the farm too bad for use? And if it was too bad for use, why was not the lorry returned to the garage? Why was it facing, not Nakuru towards which it must have been driven, but Eldoret? Counsel for the plaintiffs suggested the answer. The lorry was parked where it was, on the main road facing downhill, to facilitate the starting next morning because the battery was down. I have no doubt about that at all. When the Panesar car came along its lights were not “on” and its reflectors were not reflecting. We have this from Mr. Mwangi and Mr. Mehenga Singh apart from Mr. Panesar. The point has been made that Mr. Mwangi's immediate reaction was to comment on the place of parking rather than on the lack of lights. But I do not see why his reaction should not have been “What is that vehicle doing there?” He did not expand but Mr. Mehenga Singh was uncommunicative. He thought, in fact, that Mr. Mwangi was only cursing. Mr. Todd asked them both about visibility. They referred to the darkness and fog. They agreed that the lorry constituted a danger to users of the road. Both said there was difficulty in passing it because it loomed up suddenly.

Placed where it was, in the condition that it was, the lorry constituted a real threat and danger to users of the road. Both nuisance and negligence have been established. There is a difference between the two causes of action, though Scott, L.J., in *Slater v. Worthington's Cash Stores* (3) ([1941] 3 All E.R. at p. 31) said: “It does not matter in the least, in my view, whether one calls it an action in nuisance or an action in negligence”. Certainly the defence of contributory negligence may be set up against it: *Trevett v. Lee* (4). The issue is primarily one of negligence: *Fisher v. Ruislip* (5). Leaving an unlit lorry on the road is not, I apprehend, a nuisance per se, but if it is a nuisance then the plaintiff can recover on that bases apart from negligence: *Ware v. Garston* (6). It was known that the lights would not last out in a place which was known or should have been known by the defendants to be dark. The reflectors were not up to the work in hand. Proper steps to avoid or prevent accident and injury were not taken. The second defendant was in no doubt about the matter. Nor am I. The first defendant is responsible in law to the same extent as his co-defendant for resulting damage and injury.

Having stopped in Nakuru the Panesar party left for Eldoret at some time after 9 p.m. Mr. Panesar told us that he drove at 40-45 m.p.h. At that speed he would have arrived at the scene of the accident long before the time first mentioned in in the pleadings. He had no compunction in bringing the hour forward. The

vehicle stopped for a running repair about a quarter to half-a-mile before the lorry. There the second of the two vehicles, the pick-up driven by Mr. Mwangi, caught up with it. Mr. Panesar held conversation with Mr. Mehenga and the pick-up went its way. It arrived in Eldoret without mishap but not without difficulty. Mr. Mwangi told us:

“It was a short time after passing Gian Singh that I passed a lorry. It was about half a mile . . . When I first saw the lorry I was about twenty to twenty-five feet away but I did not recognise it as a lorry. When I saw this object I applied my brakes and looked at it more closely. Then I swerved to the centre of the road and passed it. I thought it better to slow down so I could see that object clearly. When I approached the lorry I was doing thirty-five m.p.h. . . . The lorry was parked in a very dark place and could not be seen clearly.”

However, when Mr. Panesar did not arrive home Mr. Mehenga Singh's main consideration was whether his car had had a puncture to its tyres. Only secondarily as to whether there had been a collision with the lorry. If Mr. Mwangi could pass the lorry with difficulty but without hitting it, why could not Mr. Panesar do so? He says that his speed was 40-45 m.p.h. That his car went 309 feet from the point of contact means little enough for he lost control, the road was downhill and the scrub helped to bring it to a standstill. But there were no skid or brake marks on the road to suggest that upon emergency adequate or any avoiding action was taken. Mr. Panesar was anxious to impress us with his care as a driver and told us that he was driving on his near-side two or three inches from his near-side. Certainly he was driving on his near-side for having swung his car to the middle of the road he yet hit the lorry's off-side rear corner of its cross-beam. He says that he first saw the lorry's tyres “28-30-32 feet” away. Roughly the same distance as Mr. Mwangi. Mr. Mwangi missed it with no more than a comment or a curse. We do not know the relative looks of the vehicles or just where in the road Mr. Mwangi was driving, but he only saw “an object” looming up and yet had time to slow down, look at it more closely, and pass on. Mr. Panesar saw it clearly enough to know that he was looking at a lorry's tyres, that it was a platform lorry and that it had a cabin with no-one in it. He should have been able to take appropriate and adequate avoiding action. And did not. He says that he gently applied his brakes. I do not believe that he did. In an emergency, if thinking time is at a premium, you do not ponder upon gentleness. Mr. Panesar wishes us to believe that his thinking faculties were brought to bear on the situation. They were not. But if they were, he was further than “28-30-32 feet” from the lorry when he first saw it and should have avoided it. I believe that Mr. Panesar was going too fast in the conditions in which he found himself and was not keeping a look-out. Nor should he have been travelling on this dark night with his lights dipped. He should not have been travelling so near to his near-side at his speed knowing how dark the road was at the point of impact. If he had been driving on his headlights he would have seen that much more that much sooner and, provided there was a proper look-out should have avoided an accident. He drove negligently and contributed to it. There is no rule of law that when you drive at night you must be able to pull up well within the limits of your lights. It is a question of fact in each case: *Morris v. Luton* (7). But on Mr. Bidmead's evidence Mr. Panesar's lights threw a less than adequate beam. If you know that you can see no more than thirty-two feet in front of you, you take a great risk if you travel at 40-45 m.p.h. because it is almost twenty yards a second. What evading action can you take in half a second? But in case it should be thought that I have arrived at my decision by setting up Mr. Mwangi against Mr. Panesar I would say that I have not.

The facts in *Harvey v. Road Haulage Executive* (8) were not unlike those in the present case. There a lorry broke down and was left across a road. It was foggy. A motor cyclist, travelling too fast to see the vehicle in time to avoid a collision, hit it. It was held that the mere fact of the motor cyclist's negligence being subsequent to that of the car driver did not necessarily mean that the motor cyclist was wholly to blame for the accident. Each case must depend on its own facts. The facts of the instant case lead me to believe that the parties were equally to blame and I so find. This finding only affects the first plaintiff for the passengers in the car were not identified with their driver's negligence: *Lampert v. Eastern National Omnibus Co. Ltd.* (9). In such circumstances it is no defence for the defendants to prove that someone else contributed to the accident: Halsbury's Laws of England (3rd Edn.), Vol. 28, p. 95, para. 100).

A doctor (with some degree of inaccuracy) assessed the children's ages. At the time with which we are concerned, Gurchan was six, Satwinder eleven, Guriqbal seven and Balbir Kaur almost seventeen years old. The injuries suffered by the plaintiffs are set out in the medical reports. There was also some oral evidence about them. Which two of Mr. Panesar's ribs were damaged is not clear for reports differ as to which they are. The reports are in by consent. My assessments are based on their contents.

Shortly (and with, I hope, a minimum of inaccuracy) Mr. Panesar had a simple fracture of the 8th and 9th or 9th and 10th ribs, a simple fracture of the ring finger, terminal phalanx, laceration of the scalp, multiple, though minor, bruising and abrasions over the chest, back, cheek, nose and back of right hand. He spoke of them in evidence but he was not over modest in favouring himself and I accept his injuries to be as stated in the reports and no more. He was in hospital about a week and needed treatment for another month. Mrs. Kaur had minor bruising. I do not accept that she is afraid to get into a car. There is nothing about it in the reports. One would have expected her to have consulted a doctor. But there is no evidence that she did. She was in hospital for a day or less. Gurchan suffered most. Dr. Bassan reported:

- “(a) Depressed fracture forehead about one inch diameter with laceration forehead about seven inches X bone deep, irregular involving upper eye-lid and leaving a deformed upper eye-lid.
- (b) Laceration right nostril about one inch long completely tearing away small part of the nostril.”

Dr. Treadway reported:

“Moribund on admission, shocked with a laceration extending over the top of his scalp transversing both frontal bones with a depressed fracture of the skull exposing the dura. Lacerated forehead and left brow and eye. Right ala of the nose and both gums and lips.” And he “sustained a depressed fracture frontal bone and a badly lacerated face. He very nearly died.”

Dr. Keuner reported:

“Multiple sears on his forehead, his eye and his nose. There was a transverse scar in the left forehead area from hairline down to the margin of the upper eyelid. The frontal bone underneath this scar was depressed. Another depression was felt at the outer one-third of the bone underneath the eyebrow. There was a horizontal scar half way along the upper eye-lid which crossed towards the root of the nose and across the eye-brows. The scars on the eye-brow were at least three mm. wide. Additional scarring was present at the left temple area starting at the upper outer corner of the eye. The middle one-third of the upper lid presented a triangular defect

measuring about 5 mm. in width and 3 mm. in length. There was inability to achieve complete closure of the eye-lid. Another scar, which caused a widening and enlarging deformity of the rim was present at the right nostril.”

Mr. Wood reported:

“A depressed fracture of the frontal bone, a lacerated face and the loss of two incisor teeth.”

Dr. Keuner ignored the first operation for his report speaks of a first operation being carried out on March 13, 1964. He says that the operation was done:

“Under general anaesthesia, and revision of the scars of the eye-brow, repair of the defect of the eye-lid and repair of the nose was performed with satisfactory results. Another evaluation in about six month’s time will be necessary to see if any more correction will be necessary.”

Mr. Wood refers to both operations, saying in relation to the second one:

“At this time a revision of the scar on the left eye-brow was done and also in revision of the scar on the left upper eye-lid with a Z-plasty of the lid. Correction was also carried out on the scar affecting the right nostril.”

He pointed out that a skin graft would be required for the upper lid on the left side and a composite graft to the right nostril but that the other scars were settling down well, further surgery for them not being contemplated. He gave evidence to the same effect but with a more up-to-date assessment for he saw Gurchan on November 1, last. He told us:

“We took some hairs out of upper lid which were touching on eyeball on left side. We did this on two occasions . . . That was not the treatment I indicated in June 3 report . . . No skin graft has been done . . . The scars are much improved. The accident he suffered from has left him permanent damage from the point of view of his appearance – not functional – he can eat normally and breath normally through his nose. The disfigurement will remain – a degree will remain that is – it will be possible to do something further for him when he is older. I would not be able to restore him to what he was . . . I do not think there is any injury to the brain . . . There is no functional disability but only a cosmetic deformity . . . He has slight difference between the two eye-lids . . . An operation would not put it right. He couldn’t close his left lid before but we have released that . . . We are unlikely to be able to improve his appearance very much from what it is now . . .”

In fact there had been the skin graft by Dr. Treadwell. Gurchan must have suffered much. He has been operated upon and must again be operated upon. Scars have been revised and must again be revised. His appearance will never be as it was. He has what counsel for the plaintiffs rightly calls “a twisted expression”. His disfigurement is obvious and, I regret to say, ugly. It will be with him (subject to what Mr. Wood can do for him) throughout his life. Balbir Kaur had a simple fracture of her left clavicle and minor bruising on her left cheek and behind her ear. She was in hospital for a day or less and was in plaster. Satwinder who was in hospital for a like period had a lacerated scalp wound six inches long down to, but not damaging, the bone. Guriqbal had minor bruising and was in hospital for a day or less. Every one of the six was shocked. Some treatment was undertaken as appears from Dr. Treadway’s report but it was of a routine nature except in the case of Gurchan “who had a repair and skin graft to his left eye by me some two-three months later . . .” Only Gurchan had any residual effects.

An award of general damages for personal injury must have regard to other awards in similar cases. So we looked. No one could find anything very close.

Multiple injuries must be considered in their totality: *Cavinato v. di Filippo* (10). The cases in relation to Mr. Panesar referred to injuries more serious than he received. Nor is it clear whether they included such matters as loss of earnings. I assess the sum of £250. It is a wonder that it was thought worth while claiming for Mrs. Kaur but she is entitled to something. I award her £10. Gurchan has no brain injury, no mental retardation – I do not accept his father’s evidence in the light of what Mr. Wood told us, save that the boy may well feel unsettled and none too happy with life – there is no loss of taste or smell, no loss of the power to masticate and no speech defect. But he has the looks of which I have spoken. Of the cases referred to none is on all fours. In *Baggot v. Pinguey* (11) there was an agreed figure, we do not know the facts and the amount differs from the other cases referred to these being in the £424 to £1,250 range. Like Byrne, J., in *Randle v. Hands* (12) (see Kemp and Kemp’s *The Quantum of Damages* (2nd Edn.), Vol. 1, p. 249) I find the boy’s disfigurement distressing to see. He has such an unpleasant look. I award £1,050 to him. Balbir Kaur’s collar bone must soon enough have been put back. I was referred to *Pickering v. White* (13) but in that case there was a fractured collar bone and laceration of the head. I award her £40. Counsel for the plaintiffs thought that Satwinder’s cut head would be about as painful as Balbir’s collar bone. I imagine it might be more painful and take more time to heal. It went rather deep. But counsel may well be right and I award the boy £40. Guriqbal is on a par with his mother and I award him £10. Having regard to the matter of contributory negligence Mr. Panesar will only receive £125.

And I turn to the matter of special damages. Damage to the car was agreed at £125 so Mr. Panesar will get £62 10s. Medical expenses were agreed at £61, and, on the basis of a fifty per cent. contributory negligence, at £45 which sum I award. I assess travelling expenses at £3 12s. Three journeys were made. The first was unnecessary, the second was wasted through late arrival and the third was required. But they were made in a borrowed, not a hired car. I award £2 10s. for subsistence. The relatives will take what they can get. Mr. Panesar asked £6 a day and gave evidence of £1 5s. We were not told how many days were needed for the third visit. Two days would be the minimum. Interest on the various amounts will, counsel for the plaintiffs agreeing, run from the date of judgment.

Costs are in the discretion of the court. Both sides say that one award should be made to take in all relevant factors. I agree. I award seventy-five per cent. of the taxed costs. It was nice having senior counsel for the plaintiffs with us but I do not see that a case has been made out for two counsel.

I answer the issues as follows: (1) Yes. (2) Yes. (3)(a) Yes; (b) Diminution of one-half. (4)(i) No; (ii) Not applicable; (iii) Not applicable. (5) Set out above. There will be judgment for the plaintiffs for the sums mentioned with interest and costs as aforesaid.

Judgment for the plaintiffs. Award for damages accordingly.

For the plaintiffs:

Lawrence Long & Co., Nakuru

J. M. Nazareth, Q.C., with R. B. Varia

For the defendants:

B. R. Patterson-Todd, Nakuru

Abdul Aziz Suleman v Nyaki Farmers Co-operative Ltd and another

[1966] 1 EA 409 (CAN)

Division: Court of Appeal at Nairobi
Date of judgment: 10 October 1966
Case Number: 31/1966
Before: Duffus Ag VP
Sourced by: LawAfrica

[1] Practice – Discovery – Production and inspection of documents – Combined application – Request at the hearing for discovery of specific document under O. 10, r. 18 (3) – Civil Procedure (Revised) Rules, 1948, O. 10, rr. 11, 13 and 17 (K.) – Discretion to grant application under different rule refused.

[2] Practice – Order and Rule under which relief is sought on a notice of motion should be stated.

Editor's Summary

The applicant by notice of motion applied for an order that the respondent do state by affidavit whether he had certain specific documents in his possession and if not to state what had happened to those documents, under the provisions of O. 10, r. 11 of the Civil Procedure (Revised) Rules, 1948, together with an order for the production and inspection of these documents under O. 10, r. 13 and r. 17. The trial judge was prepared to make the usual order for discovery under r. 11 but refused to make the order asked for because r. 11 was not applicable. The judge also refused leave to appeal. The applicant applied to the Court of Appeal for leave to appeal and an extension of time to lodge the appeal. At the hearing of the application it was submitted for the applicant that the order for discovery should have been made by virtue of the provisions of r. 18 (3) and that that rule was mentioned at the hearing of the application although not stated in the notice of motion.

Held –

- (i) Order 10, r. 11 was not applicable as the order sought was for discovery of certain specific documents in the respondent's possession and, if not, to state what had happened to those documents as provided for under O. 10, r. 18 (3) and accordingly the judge correctly acted in his discretion in refusing the order for discovery under O. 10, r. 11;
- (ii) the usual practice of specifying the Order and Rule under which relief is sought should be followed.

Application refused.

No cases referred to in judgment.

Judgment

Duffus Ag VP: This is an application for leave to appeal to this court from the order of a judge of the High Court dismissing a motion seeking an order for the discovery of and the production and inspection

of documents. The learned trial judge refused leave to appeal. This application also seeks an extension of time within which to lodge the appeal. The motion in the High Court was unusual in that it sought to combine an order for discovery of documents under the provisions of O. 10, r. 11 together with an order for the production and inspection of these documents under O. 10, rr. 13 and 17 (K.).

I will first consider the application for the discovery of documents. The motion is headed as having been brought under O. 10, rr. 11, 13 and 17 and s. 97 of the Act. The application for the discovery of documents was brought under O. 10, r. 11 and from the judge's notes of the hearing it is apparent that the arguments

before the High Court were based on an order being asked for and made under r. 11. Before this court, counsel for the applicant depended on r. 18 (3), and stated that the order for discovery should have been made by virtue of the provisions of this rule. I accept counsel's statement that r. 18 (3) was mentioned to the learned judge but it is clear from the judge's notes of the proceedings and also from the applicant's own notice of motion that the applicant sought for this order to be made under the provisions of r. 11. It is also apparent that the provisions of r. 11 do not apply in this case and it is to be noted that the learned judge stated in his decision that he was willing to make the usual order for discovery under r. 11 but the applicant did not ask for this order, but rather sought for the order asked for in his motion, that is for the respondent to state by affidavit whether he had certain specific documents in his possession and if not to state what had happened to these documents.

I agree with learned counsel for the applicant that our rules do not specifically require a particular order and the rule under which an order is sought to be stated in the notice of motion. But as far as I am aware of, this is the usual practice and one which should be followed. I would mention though that O. 48, r. 3 requires that the forms used for the purposes of Civil Procedure Act shall, with such variance as the circumstances of each case require, be those set out in the appendix, and there practically all forms including the only form of notice of motion (Appendix A. No. 3), refer to the relevant order and rule. In any event, while I agree that the judge has a wide discretion to act under any of the rules of the court, yet when an applicant applies by motion under a particular rule and then, as here, at the hearing also seeks the order under that rule, and where clearly the application cannot be granted under that rule, he can hardly complain if the court refuses his application. His remedy would be to bring a fresh application under the correct rule. I am of the view therefore that the judge correctly acted in his discretion in refusing the first part of this application, seeking an order for discovery under O. 10, r. 11.

It would follow from this that the order sought under the second part of the motion was also correctly dismissed. In any event I do not see how the court could have made the order sought for the respondent to produce documents to the court and to allow inspection until the first part of the order had been made and complied with, and the court would then know where the documents were and be able to deal with any objection as to the production. It is possible that the court may, in its discretion have postponed this part of the motion until the first part had been complied with.

In my view the learned judge acted correctly in dismissing this motion. I see no reason to grant leave to appeal. It would be in the interests of the parties to get on with those proceedings and not to continue to try and enforce a defective application. The application is refused with costs to the respondent.

Application refused.

For the applicant:

Khanna & Co., Nairobi

D. N. Khanna

For the respondent:

Kaplan & Stratton, Nairobi

W. S. Deverell

Elizabeth Edmea Camille v Amin Mohamed EA Merali and another

[1966] 1 EA 411 (CAN)

Division: Court of Appeal at Nairobi
Date of judgment: 8 November 1966
Case Number: 34/1966
Before: Sir Charles Newbold P, Duffus Ag VP and Spry JA
Sourced by: LawAfrica
Appeal from: The High Court of Kenya – Madan, J.

[1] Practice – Summary procedure – Leave to defend – Action for arrears of rent under a lease – Affidavits of tenant alleging that lease obtained by fraud and that tenant entitled to claim damages for defects in the premises – Judgment entered for plaintiffs – Whether leave to defend unconditionally should be given – Whether counterclaim can be regarded as defence for purposes of Civil Procedure (Revised) Rules, 1948, O. 35 (K.).

[2] Evidence – Affidavit – Affidavit in support of application for summary judgment – Suit by two plaintiffs – Affidavits sworn by one plaintiff without statement that deponent had authority of other plaintiff – Whether affidavit so insufficient as to affect jurisdiction – Civil Procedure (Revised) Rules 1948, O. 18, r. 3 (K.).

Editor's Summary

The respondents filed a plaint against the appellant claiming a sum of Shs. 25,000/- as arrears of rent and applied for summary judgment under O. 35 of the Civil Procedure (Revised) Rules, 1948. The appellant filed two affidavits with the object of obtaining leave to defend making allegations that the lease had been obtained by fraud and that she had a claim for damages for disrepair against the respondents. The trial judge refused leave to defend, entered judgment as prayed but subject to the proviso that if the appellant deposited the sum of Shs. 25,000/- in Court within 21 days, the money would not be paid out to the respondent until determination of any proceedings which the appellant may take whether in the suit or by a separate action for damages. On appeal the appellant asked for unconditional leave to defend. The issues raised by the appeal were firstly whether the affidavit of one of the respondents was so unsatisfactory that it could not be used in support of the motion for leave to enter summary judgment and secondly whether unconditional leave to defend should be granted when there is a set-off or counterclaim. For the respondents it was submitted that a claim which may found a counterclaim but which cannot be the basis of a set-off cannot be a defence for the purposes of O. 35 of the Civil Procedure (Revised) Rules, 1948, and that there cannot be a set-off against a claim for rent.

Held –

- (i) when an affidavit is made by one of several plaintiffs whose cause of action is precisely the same, it is not necessary that the affidavit should state that it is made on behalf of all the plaintiffs, though it would undoubtedly be preferable to do so;
- (ii) Per Spry, J.A.: the insufficiency of an affidavit could deprive the Court of jurisdiction but any insufficiency can be cured by other affidavits whether or not by the same party;

- (iii) Per Newbold, P., and Duffus, Ag. V.-P.: the allegation that the premises were defective and that there was a reasonable claim for damages raised a triable issue as to a claim for damages, however this did not provide a defence by way of equitable set-off to the claim for rent; it provided a basis for a counterclaim or for a separate action;
- (iv) Per Duffus and Spry, JJ.A.: by reading O. 8 and O. 35 together the existence of a set-off or counterclaim is sufficient to entitle a party to defend within

the meaning of O. 35, r. 2, but (per Duffus, J.A.), the court has a discretion to enter judgment on the claim under O. 12, r. 6, and would then give unconditional leave to raise the counterclaim;

- (v) Per Newbold, P., Duffus and Spry, JJ.A., dissenting: the judge was entitled to enter judgment in favour of the respondents but erred in ordering the appellant to provide a deposit of a sum of Shs. 25,000/-; the appellant be at liberty to file a counterclaim and the execution be stayed pending the determination of the counterclaim.

Appeal allowed in part.

Cases referred to in judgment:

- (1) *Assanand & Sons (Uganda) Ltd. v. E.A. Records Ltd.*, [1959] E.A. 360 (C.A.).
- (2) *Phakey v. World Wide Agencies Ltd.* (1948), E.A.C.A. 1.
- (3) *Standard Goods Corporation Ltd. v. Harakchand Nathu & Co.* (1950), 17 E.A.C.A. 99.
- (4) *Caspair Ltd. v. Gandy*, [1962] E.A. 414 (C.A.).
- (5) *Lagos v. Grunwaldt*, [1910] 1 K.B. 4.
- (6) *Standard Discount Co. v. La Grange* (1833), 67 C.P.D. 67.
- (7) *Pathe Freres Cinema Ltd. v. United Electric Theatres Ltd.*, [1914] 3 K.B. 1253.
- (8) *Nandala v. Lyding*, [1963] E.A. 706 (U.).
- (9) *Symon & Co. v. Palmer's Stores (1903) Ltd.*, [1912] 1 K.B. 259.
- (10) *Les Fils Dreyfus et Cie S.A. v. Clarke*, [1958] 1 W.L.R. 300.
- (11) *Begg v. Cooper* (1878), 40 L.T. 29.
- (12) *British East Africa Corporation (1939) Ltd. v. Shah Govindji Ladha* (1939), 18 K.L.R. 91.
- (13) *Court v. Sheen* (1891), 7 T.L.R. 556.
- (14) *Ford v. Harvey* (1893), 9 T.L.R. 328.
- (15) *Morgan & Son Ltd. v. S. Martin Johnson & Co. Ltd.*, [1949] 1 K.B. 107.
- (16) *Nakasero Trading Co. Ltd. v. Motibhai Bhikabhai Patel* (1935), 5 U.L.R. 141.
- (17) *Hasmani v. Banque du Congo Belge* (1938), 5 E.A.C.A. 89.
- (18) *Kundanlal Restaurant v. Devshi & Co.* (1952), 19 E.A.C.A. 77.
- (19) *Souza Figuerido & Co. Ltd. v. Moorings Hotel Ltd.*, [1959] E.A. 425 (C.A.).
- (20) *Rawson v. Samuel* (1841), 41 E.R. 451.

The following judgments were read:

Judgment

Sir Charles Newbold P: This is an appeal against the decision of a judge of the High Court refusing a

defendant unconditional leave to defend a suit.

The plaintiff claimed that the defendant owed the plaintiffs a specified sum of money as rent for a period of five months under a lease dated February 1, 1966. The plaintiff having been filed, the plaintiff took out a motion under O. 35 asking that judgment be entered against the defendant for the amount claimed in the plaintiff. This motion was supported by an affidavit of one of the plaintiffs, who stated that the defendant was truly indebted to both plaintiffs in the sum and in the circumstances set out in the plaintiff and that he believed that there was no defence to the suit. Paragraph 4 of the plaintiff's affidavit set out that "the facts deposed hereto are true to the best of my knowledge, information and belief".

The defendant filed two affidavits with the object of obtaining leave to defend and in them she made allegations that the lease had been obtained by fraud and

that the premises were in such a condition that she was entitled to bring a claim for damages against the plaintiffs. It is clear from her affidavits that with knowledge of what she described as the fraudulent acts of the plaintiffs she had elected to adopt the lease and continued to hold the property under the lease; indeed, she had applied to the Rent Control Tribunal for a reduction of the rent.

The judge having examined and carefully considered the allegations and claims set out in the defendant's affidavits, stated as follows:

"It will be noted that there is really no defence set up or alluded to in so far as the plaintiff's claim for rent is concerned."

He then proceeded to examine the defendant's allegations that she was misled into signing the lease and he expressed doubt as to her bona fides though he did make it clear that she might have a claim for damages in respect of defects in the premises. In the result he ordered that judgment be entered for the plaintiffs on the plaint but he added a proviso to the effect that if the defendant deposited the sum of Shs. 25,000/- in court within twenty-one days the money would not be paid out to the plaintiffs until the determination of any proceedings which the defendant might take, whether in this suit or by separate action, for damages against the plaintiffs.

From this decision the defendant appealed and has asked this court to give her unconditional leave to defend. Two main issues were raised on this appeal. First, that the affidavit of the plaintiff was so unsatisfactory that it could not be used in support of the motion for leave to enter judgment. Secondly, that the affidavits of the defendant had raised triable issues and unconditional leave to defend should have been granted.

As regards the first issue, the two points urged were that the affidavit was made by only one of two plaintiffs without a statement that the deponent had the authority of the other plaintiff to make the affidavit; and, secondly, that by para. 4 of the affidavit it was stated that the affidavit was made partly from information and belief without specifying the sources of such information. While the form of the affidavit was by no means satisfactory – and I would here again emphasise the words of Sir Kenneth O'Connor, P., in *Assanand & Sons v. E.A. Records* (1) ([1959] E.A. 360 at p. 364) as to the necessity of complying with the provisions of O. 18, r. 3 – I do not consider that it was so bad as, in the particular circumstances of this case, to preclude the court from paying any regard to it. It was made by one of the plaintiffs and it set out that the debt was owed to both and that there was no defence to the suit. Except for the addition of para. 4 it was in the prescribed form. Where an affidavit is made by one of several plaintiffs whose cause of action is precisely the same, I do not think it necessary that the affidavit should state that it is made on behalf of all the plaintiffs, though it would undoubtedly be preferable to do so. Paragraph 4 is very unsatisfactory, but having regard to the contents of the affidavit it is obvious surplusage as the plaintiff was swearing to the facts in relation to his own business. Accordingly, in my view, there is nothing in the first issue raised on this appeal.

As regards the second issue, two triable issues are alleged to have been raised in the defendant's affidavits. The first is that the defendant was entitled to avoid the contract by reason of fraud. If such a triable issue had been raised then obviously unconditional leave to defend must be given. I am, however, satisfied that no such triable issue was raised in the affidavit because, apart from the bona fides of the defendant about which the trial judge had doubts, it is clear from the affidavits that the defendant, with full knowledge of the position, had elected to be bound by the lease and she cannot therefore at this stage seek to avoid it.

The second triable issue alleged to have been raised is that there was a reasonable claim to damages for defects in the condition of the premises. In my view, and I think in the view of the trial judge, the facts alleged do raise a triable issue as to a claim for damages. This, however, would not provide a defence to the claim for rent, it would merely provide a basis for a counterclaim. Counsel on behalf of the defendant, urged that it would also provide a defence by way of equitable set off to the claim for rent. I do not consider that it would, as a claim for unliquidated damages for breach of a personal covenant will not provide a set off, equitable or legal, to a claim for rent. Unless this claim for damages, which can properly form the subject of a counter-claim, can also be used as a basis for an equitable set off to the claim for rent, then the existence of a triable issue on the counter-claim for damages would not be sufficient to enable the defendant to obtain unconditional leave to defend. The proper order where there is a counter-claim, the facts of which do not also provide a defence to the claim, is to refuse leave to defend and to make an order giving judgment on the claim but to stay the execution thereof until the determination of the matters raised on the counter-claim or until further order. It is obvious that this must be the position because unless there is some defence to the claim itself, as opposed to the setting up of the counter-claim, at the end of the trial the order of the judge would be to enter judgment for the amount claimed on the plaintiff and then, if he accepts the counter-claim, to enter judgment for the defendant on the counterclaim. The effect, therefore, of a counter-claim is not to prevent judgment being entered on the plaintiff but to delay the enforcement of such judgment until the matters in dispute between the parties can be determined.

Before a defendant is entitled (as opposed to the exercise of the discretion of a judge in any particular case to give leave to defend) to unconditional leave to defend a plaintiff, the defendant must show a triable issue which would or might result in the judgment on the plaintiff being affected; and that is, as far as the circumstances of this case are concerned, a claim to a set off. As I have said, I do not consider that the defendant's claims would give rise to a set off though they would clearly give rise to a counter-claim. In these circumstances, no matter what the defendant proved if she were given unconditional leave to defend, the judge, at the end of the trial, would nevertheless have to enter judgment for the amount claimed on the plaintiff. Thus, in my view, the decision of the judge refusing her unconditional leave to defend and entering judgment for the plaintiffs on the plaintiff was correct.

I consider, however, that his order requiring the deposit of Shs. 25,000/- was an incorrect order. What should have been done was that execution of the judgment should have been stayed, as the judge considered that there was a triable issue on the proposed counterclaim, until the determination of any such claim.

The proceedings consist as yet only of a plaintiff and if the order of the judge entering judgment for the plaintiff on the plaintiff is confirmed without further order it is difficult to see how a counterclaim could be filed in proceedings which have terminated with a judgment. The answer would be to confirm the order entering judgment on the plaintiff subject to the right of the defendant to file a counterclaim in the same proceedings if such counterclaim is based on the allegations contained in her affidavits. The costs of the plaintiff and of the motion for judgment should, I think be in the discretion of the judge who determines the counterclaim, if one is filed within the specified time, but if no counterclaim is so filed then the plaintiff should be entitled to the costs of the plaintiff and of the motion.

I would accordingly dismiss the appeal in so far as it seeks to vary the decision and decree of the trial judge in entering judgment for the plaintiffs on the plaintiff, but I would allow the appeal in other respects and set aside all the other provisions

of his decision and the decree and substitute therefore the following orders: First, an order that notwithstanding the entry of judgment on the plaint the defendant should be at liberty to file a counterclaim, claiming damages in respect of defects in the premises the subject of the lease under which the rent is owed, within fifteen days of the date hereof. Secondly, an order that execution of the judgment on the plaint be stayed for fifteen days from the date hereof and if, within that period, the defendant files such a counterclaim then the stay of execution shall continue until the determination of that counterclaim or until further order of the court. Thirdly, an order that if no such counterclaim is so filed then the plaintiff is to have the costs of the plaint and of the motion for judgment, but if it is so filed then such costs shall be in the discretion of the judge who determines the counterclaim.

As regards the cost of this appeal I would allow the appellant two-thirds of the costs with a certificate for two counsel. As Duffus, Ag. V.-P., agrees with these proposals it is ordered accordingly.

Spry JA: The respondent filed a plaint in which they claimed the sum of Shs. 25,000/- as rent due and unpaid under a lease, the appellant entered an appearance and the respondents then applied by motion under O. 35, r. 2, of the Civil Procedure (Revised) Rules, 1948, for summary judgment. The appellant filed an affidavit (and later a supplementary affidavit) in which, in effect, she admitted liability for the rent but claimed to have a counterclaim for damages arising out of the same transaction, and sought leave to defend.

The learned judge refused leave to defend, entered judgment as prayed and gave the respondents the costs of the application

“but subject to the proviso that if the defendant will deposit the sum of Shs. 25,000/- in court within twenty-one days, the money not to be paid out to plaintiff until determination of any proceedings which the defendant may take whether in this suit or by a separate action for damages against the defendants (sic).”

In the course of his ruling, the learned judge said:

“It will be noted that there is really no defence set up or alluded to in so far as the plaintiffs’ claim for rent is concerned.”

He had earlier remarked that

“the defendant’s allegations if they are established may result in her being awarded damages”.

He went on, however, to say that this would not “produce an answer to the plaintiffs’ claim save to the extent that . . . her liability may be reduced or extinguished by set-off of any damages that she may be awarded.”

The appellant has appealed to this court on two separate and distinct grounds. The first, a matter that was not raised in the High Court, is a submission that the affidavit filed in support of the application for summary judgment was so defective that the court never had jurisdiction to act on it. Counsel for the appellant, drew attention to the facts, first, that the affidavit was made by one of two plaintiffs, who did not depone that he had personal knowledge of the matter or that he had been authorised by the other plaintiff to make the affidavit, and, secondly, that the affidavit concluded with the words “The facts deponed hereto are true to the best of my knowledge, information and belief”.

The appellant submitted that when the rule speaks of an affidavit by “the plaintiff”, that can only mean, where there is more than one plaintiff, all the plaintiffs. This would still leave it open to one of several plaintiffs to make the necessary affidavit, but he would then do so for himself as plaintiff and as agent for the other plaintiffs, in which case he would be under a duty in the latter

capacity, to comply with the statutory form by deponing to his personal knowledge of the facts and to his authority. The appellant argued that one of several plaintiffs might not be in possession of all the facts and might, for example, in all good faith, make an affidavit that money was owing which had, in fact, been received by another plaintiff.

Secondly, counsel for the appellant submitted that the court should not look at an affidavit which is expressed to be based on knowledge, information and belief, both because O. 35 requires a deponent to be able to swear positively to the facts and because, where belief is concerned, O. 18 requires the ground for the belief to be stated. If information is relied on, the source of it must be disclosed. In this connection, counsel for the appellant relied on *Phakey v. World Wide Agencies Ltd.* (2), *Standard Goods Corporation Ltd. v. Harakchand Nathu & Co.* (3), *Assanand & Sons (Uganda) Ltd. v. E.A. Records Ltd.* (1) and *Caspair Ltd. v. Gandy* (4). Also the fact that there was a reference to information and belief cast a doubt on the deponent's personal knowledge of the facts.

Counsel for the appellant went on to argue that not only should the court decline to accept as evidence a defective affidavit but further that so far as O. 35 is concerned, the court has no jurisdiction to enter judgment where the plaintiff's affidavit is defective, because the existence of an affidavit complying with the statutory requirements is a condition precedent to the exercise of the court's power. For this proposition, counsel relied on *Lagos v. Grunwaldt* (5).

Counsel for the respondents, argued that the affidavit by the first plaintiff was one on which the learned judge was entitled to rely: it followed the statutory form (From 3A of Appendix A to the Civil Procedure (Revised) Rules, 1948), except in the closing words; it is apparent from that form that a plaintiff is not required to depone to his knowledge of the facts, which the rule presumes him to have, and therefore the reference to "knowledge information and belief" could be dismissed as mere surplusage. It is a matter of common knowledge that, in spite of all that has been said judicially, advocates do habitually use those words and no particular meaning should be read into them. The fact that knowledge of the facts may be presumed in a plaintiff meant that there was no reason why the court should not rely on the affidavit of one of two plaintiffs. Finally, if the affidavit did fall short of what is desirable, the learned judge was entitled, in counsel for the respondents' submission, to look to the affidavits of the appellant, which left no doubt that the rent was due and was unpaid.

As regards counsel for the appellant's submissions, I see no reason why the court should not act on the affidavit of one of several plaintiffs, although, the fact that there are other plaintiffs who have not deposed may go to the weight to be given to the affidavit where the facts are disputed. I consider that O. 18 applies to affidavits in support of applications under O. 35 (and this view is supported by *Lagos v. Grunwaldt* (5)). This means that if a plaintiff bases any part of his affidavit relating to the facts on information or belief (and this appears to be possible as the application is interlocutory, see *Standard Discount Co. v. La Grange* (6)), he must state the source of his information or the ground of his belief, and this again will go to the weight to be given to the affidavit. In this connection, it may be added that Buckley, L.J., in *Pathe Freres Cinema, Ltd. v. United Electric Theatres Ltd.* (7), remarked that:

"The rule seems to assume that a plaintiff is qualified to make the affidavit simply because he is plaintiff; the other person who may make the affidavit must be able to swear positively to the facts."

That case is also authority for saying that even where an affidavit is by a person other than the plaintiff a reasonable latitude is allowed, for an affidavit was accepted from the servant of a company who was able to depone positively

that a debt had been contracted but could only swear to the best of his knowledge and belief that the debt remained unpaid. That seems to me largely to answer the appellant's objection to an affidavit by one of several plaintiffs.

In my view, the affidavit, with its bare reference to information and belief is clearly defective and I do not think it is so patently made from personal knowledge that those references can be ignored as mere surplusage (*Nandala v. Lyding* (8)). Furthermore, I think it is unsatisfactory in that, coming from one of two plaintiffs, it does not show, as is, I think desirable, that the deponent's part in the conduct of the plaintiff's affairs was such as to give his testimony evidential weight. It remains to consider the effect of those deficiencies.

As I have said, counsel for the appellant argued that they had the effect of depriving the court of jurisdiction. He relied on *Lagos v. Grundwaldt* (5) and I would observe that the reasoning in that case was strongly re-affirmed in *Symon & Co. v. Palmer's Stores* (1903) Ltd. (9). In the latter case, Buckley, L.J., said:

"The question of the sufficiency of the affidavit is, in my opinion, one which goes to jurisdiction."

Those cases were, however, considered and explained in *Les Fils Dreyfus et Cie S.A. v. Clarke* (10) (to which counsel did not refer), in which the court, following the older case of *Begg v. Cooper* (11), held that the affidavit was not a condition precedent to the issue of the writ of summons, that a defective affidavit might be cured by further affidavits in the course of the proceedings and that:

"in deciding jurisdiction one looks at the matter at the end of the day on the affidavits that have been filed."

It seems to me that that argument applies even more forcefully in Kenya, where, in spite of the title to O. 35, there is, in fact, no "Specially Endorsed Plaintiff" and the summary procedure is nothing more than an application for summary judgment. Whereas in England the current practice is for the affidavit to be produced before the issue of the summons, in Kenya it is produced after the entry of appearance by the defendant. If the matter is to be looked at "at the end of the day", I think the court is entitled to look, and indeed must look, at the affidavit or affidavits filed by the defendant as well as to that filed by the plaintiff and defects in the latter may be cured by the former, just as well as by further affidavits by the plaintiff. In the present case, the defects in the affidavit have, in my opinion, been cured by the appellant's affidavits which, as I have said, amount to an admission that the rent was due and unpaid. I would hold, therefore, that there was no lack of jurisdiction.

I may add that the same conclusion was reached by Thacker, J., in *British East Africa Corporation* (1939) Ltd. v. *Shah Govindji Ladha* (12), although he had not, of course, the benefit of the latest decision.

For what is substantially the same reason, I would hold that the learned judge was not bound to ignore the affidavit of the first respondent under O. 18. It is true that he could give it little evidential weight and had the facts been in issue, I think he would have had to dismiss the application for summary judgment but here the need for evidence was removed by the appellant's admissions.

For these reasons, I would reject the first ground of appeal.

The other ground of appeal was that the learned judge, having found that the appellant's affidavits disclosed a claim to damages which might be sufficient to reduce or extinguish her liability to the respondents, was wrong to refuse leave to defend.

Counsel for the respondents began by submitting that the learned judge had exercised a discretion and

that this court could not interfere unless it was shown

that he had failed to exercise it in a judicial manner. With respect, I think that argument is misconceived. As I understand the judgment, the basis of the decision is that the existence of a set-off and counterclaim is not in itself a ground for giving leave to defend. That is a direction on law and whether it is correct or not is, as I see it, the substantial issue in this appeal.

I entertain no doubt that as a general rule a claim to a set-off and counterclaim constitutes a proper reason for giving leave to defend. (I say “as a general rule” because special considerations apply where a suit is on a bill of exchange.) I think the cases cited by counsel for the appellant, *Court v. Sheen* (13), *Ford v. Harvey* (14) and *Morgan & Son Ltd. v. S. Martin Johnson & Co. Ltd.* (15), make this clear. There is a Uganda case to the contrary, *Nakasero Trading Co. Ltd. v. Motibhai Bhikabhai Patel* (16), but that was an action on a promissory note and in any case does not appear to have been fully argued. Counsel for the respondents contended that leave to defend could only be given if there was a triable issue on the claim itself and that it was not enough that there might be a triable issue on a counterclaim. His argument, if I understood him correctly, was that a claim which may found a counterclaim but which cannot also be the basis of a set-off cannot be a defence for the purposes of O. 35 and he submitted that there cannot be a set-off against a claim for rent. I am by no means persuaded that there cannot in Kenya be a set-off against a claim for rent but I think it is unnecessary to decide that question because there can, in my opinion, undoubtedly be a counterclaim against a claim for rent and I think that, for the purposes of O. 35, a counterclaim must be regarded as a defence. I appreciate that a counterclaim has the effect of a cross-suit and that, historically, it was not a defence but in my opinion O. 35 must be read with O. 8. Reading that order as a whole, and particularly r. 13 which begins “Where in any suit a set-off or counterclaim is established as a defence against the plaintiff’s claim . . .” I think that a counterclaim must, for the purposes of the Rules, be regarded as a defence and that references to a defence in O. 15 must be so interpreted as to include counterclaims.

The learned judge clearly thought that there was a triable issue on the counterclaim and counsel for the respondents did not attempt to argue to the contrary. It has, of course, been established law in East Africa since *Hasmani v. Banque du Congo Belge* (17), that leave to defend must be granted if a triable issue is shown.

Briefly to recapitulate, my opinion on this part of the appeal is that the learned judge erred in holding that to justify giving leave to defend there had to be a triable issue on the plaintiff’s claim viewed in isolation apart from any set-off or counterclaim; I think that it was sufficient for the appellant to show a triable issue on a counterclaim; that there is nothing to prevent a claim to damages arising out of the same transaction being advanced as a counterclaim to a claim for rent; that the appellant showed a triable issue on such a counterclaim and therefore that the judge had no power to enter judgment but should have granted leave to defend.

There remains only to consider whether such leave ought to be subject to any condition. The learned judge in refusing leave to defend did not consider this question, nor did he order a stay of execution but he did make an order of an unusual nature, which I have earlier quoted and which has substantially the effect of a stay of execution conditional on the appellant paying into court the whole of the amount claimed in the plaint. He appears to have held it against the appellant that she had not offered to deposit in court the rent or any part of it. There, with respect, I think he was in error. If the appellant had a genuine counterclaim, which she believed might exceed the amount of the rent due, she was under no obligation to make any payment into court. It is

true that the learned judge expressed the opinion that “her bona fides are in doubt”. He based this on the fact that the appellant signed the lease three months after she had gone into possession, when he thought the defects in the premises must have been apparent to her, and that she had only paid one month’s rent in all.

The general rule is, that leave to defend should be given unconditionally unless there is good ground for thinking that the defences put forward are no more than a sham; and it must be more than mere suspicion (*Kundanlal Restaurant v. Devshi & Co.* (18), *Souza Figuerido & Co. Ltd. v. Moorings Hotel Ltd.* (19)). Although he said that the appellant’s bona fides were in doubt, the learned judge certainly did not say, or even suggest, that he regarded her counterclaim as a sham; nor do I think he could possibly have so held. It is only when the evidence has been heard and tested by cross-examination that it will be possible to say whether or not the counterclaim has merit. I think, therefore, that the appellant should have been given unconditional leave to defend by way of counterclaim, that being the only defence she has sought to raise. In this respect, I disregard her supplementary affidavit (which she should have sought the leave of the court to file) so far as it is inconsistent with her original affidavit, which clearly showed that she had elected to treat the lease as subsisting.

I would therefore allow the appeal, set aside the judgment and decree of the High Court and substitute an order giving the appellant unconditional leave to defend by way of counterclaim and direct, as prayed, that the defence be filed within fifteen days. I would allow the appellant her costs of the appeal, with a certificate for two counsel, and order that the costs of the application in the High Court be in the discretion of the trial judge on the determination of the suit.

Duffus Ag VP: I have had the benefit of reading the draft judgments of Newbold, P. and Spry, J.A. This is an application for summary judgment under O. 35, r. 2. The relevant portion of r. 2 provides:

“2. In all suits where a plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant with or without interest, arising –

(a) upon a contract express or implied . . .

where the defendant enters an appearance the plaintiff may, on affidavit made by himself or by any other person who can swear positively to the facts verifying the cause of action, and the amount claimed (if any) and stating that in his belief there is no defence to the suit, apply to the Court to pronounce judgment in his favour for the amount claimed together with interest (if any) or for the recovery of the immovable property (with or without rent or mesne profits) as the case may be, and costs. The Court may thereupon, unless the defendant by affidavit, by his own *viva voce* evidence or otherwise, shall satisfy it that he has a good defence on the merits, or discloses such facts as may be deemed sufficient to entitle him to defend, pronounce judgment accordingly.”

In this case I agree that the plaintiff is entitled to judgment unless the defendant has by the affidavits she has filed, shown that she has a good defence on the merits, or discloses such facts as may be deemed sufficient to entitle her to defend.

It appears from the affidavits filed that the defendant has no defence as such against the payment of the rent but that she has shown that she has a claim against the plaintiff for damages arising out of the lease of these premises. Counsel for the appellant contended that this claim would amount to an equitable set off. Counsel for the respondents conceded that the defendant’s

claim could from the basis of a counterclaim or a separate action but he submitted that the facts as shown in her affidavit would not support a plea of an equitable set off.

The learned trial judge entered judgment for the plaintiff on the claim with the costs of the suit and of the application but he ordered that an execution be stayed, provided that the defendant deposited the sum of shs. 25,000/- within twenty-one days until the determination of any proceedings which the defendant may take whether in this suit or by a separate action. He then refused leave to defend. The general effect of this order would be to allow the defendant's claim for damages to be heard and determined before any further action could be taken to enforce the plaintiff's claim for rent but provided that the defendant's deposit a rather substantial sum of shs. 25,000/- into court. The gravamen of the defendant's complaint is against this order for a deposit. I do not propose to deal with this order at length except to say that I agree with the learned President and Spry, J.A., that this part of the judge's order was wrong and should be revoked. Generally speaking if a defendant shows that he has a triable issue in a counterclaim then his right to pursue this counterclaim should not be fettered with conditions.

The matter then becomes to some extent a technical question as to whether judgment should now be entered on the claim with a stay of execution pending the determination of the defendant's counterclaim or should judgment be now refused and the claim and counterclaim heard and determined together. In this respect the question arises as to whether this is an equitable set off which would amount to a defence or merely a counterclaim; and then there is the further question as to whether if the defendant's claim is a counterclaim can she now file her counterclaim as of right or has she got to have leave to do so.

The final result must depend on the interpretation of the Civil Procedure (Revised) Rules, 1948, but before dealing with these rules I would first consider some of the English authorities. The English O. 14 is the equivalent of our O. 35 and a reference to the article on the English order appear in the Annual Practice (1966, p. 193) shows how many reported cases there have been as to the practice followed in England when there is a counterclaim in proceedings under O. 14. I have been through the various authorities. Generally speaking the main principle observed is to ensure that the defendant's claim be determined before the plaintiff issues execution or otherwise enforces his claim. The case of *Morgan v. Martin* (15) is perhaps most on the point. In that case the Court of Appeal held that in cases where the defendant's claim amounted to an equitable set-off the correct order would be to refuse to enter judgment, for the plaintiff at that stage but to give the defendant unconditional leave to defend. Tucker, L.J., in his judgment dealt fully with the question of an equitable set-off relying largely on the judgment of Lord Cottenham, L.C., in the case of *Rawson v. Samuel* (20). In considering this case, Professor Hanbury, in his book on equity (Modern Equity (8th Edn.), at p. 43) said:

"It emerges from this case, that for a demand to harden into a ground for equitable set-off, it must be effective to 'impeach the title to the legal demand', and this condition is not fulfilled by a demand which is merely speculative. Many demands which could, under the more liberal bankruptcy rules, be regarded as material for set-off, fall in equity under the head of *counterclaim*, which must be asserted in a separate action, and would not provide an occasion for a common conjunction."

With respect, I agree with the learned author and, in my view, this principle applies to the facts of this case. Undoubtedly here the defendant's claims are closely connected with the plaintiff's claim for rent. Thus by virtue of s. 108 (f)

of the Indian Transfer of Property Act, the defendant may have been able to effect the repairs which she complained of and have deducted this from the rent. If that had been done clearly she could have pleaded this as a defence to the claim for rent. On the other hand the damages suffered by the defendant follow as a result of a breach of the landlord's covenants in the lease and cannot be said to affect the landlord's right or title to the payment of his rent. The tenant could have used the rent to effect the repairs but she did not do so and she cannot now, in my view, use this right which she did not exercise to set-off here as a claim for damages against the landlord's legal right to his rent. I am therefore of the opinion that the defendant's claim to damages does not amount to an equitable set-off, although it can clearly form the basis for a counterclaim or for a separate action.

I would here consider the provisions of the Kenya Rules of Court and the first that arises is the meaning of the provision set out in r. 2 of O. 35 which states:

"... a good defence on the merits, or discloses, such facts as may be deemed sufficient to entitle him to defend,"

that is, simply, is a counterclaim a defence within the meaning of O. 35?

I would here refer to O. 8 of the Rules which deals with defences and counterclaims. Rules 2 states as follows:

"2. A defendant in a suit may set-off, or set up by way of counterclaim against the claims of the plaintiff, any right or claim, whether such set-off or counterclaim sound in damages or not, and such set-off or counterclaim shall have the same effect as a cross-suit, so as to enable the Court to pronounce a final judgment in the same suit, both on the original and on the cross-claim. But the Court may on the application of the plaintiff before trial, if in the opinion of the Court such set-off or counterclaim cannot be conveniently disposed of in the pending suit, or ought not to be allowed, refuse permission to defendant to avail himself thereof."

This rule gives the defendant the right to set-off or to set up a counterclaim in any suit and this applies to a suit in which the plaintiff may apply for summary judgment under O. 35. The defendant would therefore have the right to set up a counterclaim to any suit in which summary judgment may be applied for under O. 35 and O. 35 does not seek to deprive the defendant of this right.

I would then refer to r. 6 of O. 8 which provides:

"6. Where any defendant seeks to rely upon any grounds as supporting a right of counterclaim, he shall, in his statement of defence, state specifically that he does so by way of counterclaim."

and also to r. 7 which states inter alia:

"7. Where a defendant by his defence sets up any counterclaim which raises questions between himself and the plaintiff, together with any other persons, he shall add to the title of his defence . . ."

This rule gives and makes provision with regard to claims against third person. It appears from these two rules clear that the counterclaim has to be pleaded as a defence and filed as provided for under r. 1. Rules 8, 9, 10, 11 and 12 are also of some relevance but I would refer in particular to r. 13 which states:

"13. Where in any suit a set-off or counterclaim is established as a defence against the plaintiff's claim, the Court may, if the balance is in favour of the defendant, give judgment for the defendant for such balance, or may otherwise adjudge to the defendant such relief as he may be entitled to upon the merits of the case."

Order 8 therefore regards and deals with counterclaims as a defence and in my view expressly having regard to the fact that the defendant has a right of counterclaim on a suit to which O. 35 applies then the counterclaim must come within the meaning of the words in r. 2 –“a good defence on the merits or discloses such facts as may be deemed sufficient to entitle him to defend”.

It would appear from this that if the defendant satisfies the court that he has a triable issue on a counterclaim then the court should not proceed to enter summary judgment under the provisions of r. 2 of O. 35. The court, however, has a discretion to enter judgment on that part of the claim admitted by a defendant pending the determination of other issues. On that point I would in particular refer to the provisions of r. 5 of O. 35 and then also to those of r. 6 of O. 12. In this case the defendant has, by her affidavits read in conjunction with the plaintiff's affidavit and claim, admitted the claim and I am satisfied that it would be much more satisfactory for the court to now enter judgment on the claim and stay execution until the counter-claim is determined. One great advantage of this course would be that the issues now admitted would be finally determined and the parties would then know that the counterclaim was the only issue then remaining to be decided. In the event of the defendant not proceeding with her counterclaim the parties would not then have to return to the court for a further order. I am therefore of the view that the judgment entered on the claim should be affirmed. The learned trial judge was apparently of the view that the counterclaim could be filed without leave but with respect I do not agree. Usually if judgment is entered on a claim it is the end of the proceedings and the defendant could not then file a counterclaim except the court has specifically reserved this right to him when it entered judgment. In this case I am of the view that the defendants, should be granted leave to file the counterclaim.

I consider that the costs of the application and of the other proceedings in the High Court should be reserve to be dealt with by the trial judge on the determination of the suit. I would therefore, allow this appeal to the extent I have mentioned and I agree with the order proposed by Newbold, P.

Appeal allowed in part.

For the appellant:

Navin C. Patel, Nairobi

J. M. Nazareth, Q.C., and Navin C. Patel

For the respondent:

Shapley, Barret, Marsh & Co., Nairobi

J. A. Mackie-Robertson, Q.C., and Zool Nimji

Gabriel Joseph Sullivan v Republic
[1966] 1 EA 423 (CAN)

Division: Court of Appeal at Nairobi

Date of judgment: 8 October 1966

Case Number: 111/1966

Before: Sir Charles Newbold P, Spry and Law JJA
Sourced by: LawAfrica
Appeal from: The High Court of Kenya – Sir John Ainley, C.J. and Miller, J.

[1] Street traffic – Using vehicle when overloaded – Plea of guilty – No evidence that accused himself driving vehicle – Evidence of accused accompanying vehicle – Order for endorsement of conviction on licence – Whether accused’s plea of guilty in connexion with driving of motor vehicle – Traffic Act (Cap. 403) s. 76 (1) (K.).

Editor’s Summary

The appellant was charged with using an overloaded motor vehicle contrary to s. 56 (1) of the Traffic Act to which he pleaded guilty and stated in mitigation that he was taking the load from Molo to Nairobi and did not realise that the vehicle was that much overloaded. The magistrate fined the appellant Shs. 1,000/- and particulars of the conviction were ordered to be endorsed on his licence. On appeal to the High Court the grounds of appeal were that the order for endorsement was “harsh and excessive” and was in excess of jurisdiction in terms of s. 76 of the Traffic Act and wrong in law. In dismissing the appeal the High Court stated that it was open to the court to hold that the appellant admitted that his use of the vehicle lay in the driving of it and that the magistrate was entitled to endorse the licence. The appellant appealed to the Court of Appeal and it was submitted that as the appellant was charged with using a vehicle on a road when overloaded, and not with driving it, and as the record did not show that he was in fact driving it, the magistrate had no power to order particulars of the conviction to be endorsed on the licence.

Held – (Spry, J.A. dissenting):

- (i) the High Court was not entitled to hold on the record, that the appellant admitted that his use of the vehicle lay in driving it because the appellant’s words “I was taking the load” were at least equally consistent with his having accompanied the load while the lorry was being driven by some other person;
- (ii) The appellant unequivocally admitted responsibility for the vehicle being overloaded and admitted being with the overloaded lorry and accordingly so far as the offence of using the lorry on the road consisted of the lorry being driven, the appellant was a principal offender within the meaning of s. 20 of the Penal Code, in that he must have aided and abetted, or counselled or procured, the driver to commit the offence, even if he was not himself the driver;
- (iii) in the circumstances of the case the offence to which the appellant pleaded guilty was an offence in connexion with the driving of the motor vehicle, and the magistrate had power to order particulars of the conviction to be endorsed on the appellant’s licence.

Appeal dismissed.

No cases referred to in judgment.

Judgment

Law JA, read the following judgment of the court: The appellant was charged in the resident

magistrate's court at Nakuru with an offence contrary to s. 56 (1) of the Traffic Act (Cap. 403) which reads:

“56(1) No vehicle shall be used on a road with a load greater than the load specified by the manufacturer of the chassis of the vehicle or the load capacity determined by an inspector under this Act.”

The particulars of the charge read as follows:

“Gabriel Joseph Sullivan on the 22nd day of March, 1966, at about 1.00 p.m. at Nakuru in the Rift Valley Province used a motor vehicle Reg. No. KKG14 in Nakuru/Nairobi road with a load of 36,930 lbs. which exceeded the maximum permitted weight of 27,500 lbs. specified by the manufacturers of the said motor vehicle (By overloading 9,430 lbs.).”

By s. 58 (1) of the Act:

“58(1) Any person who drives or uses on a road a vehicle in contravention of the provisions of s. 55 or s. 56 of this Act shall be guilty of an offence . . .”

By s. 76 (1) of the Act:

“76(1) Any court before which a person is convicted of an offence in connexion with the driving of a motor vehicle may –

(e) if the person convicted holds a driving licence, order that particulars of the conviction be endorsed thereon.”

At the trial, the appellant pleaded guilty. The facts as stated by the prosecutor were:

“Deliberate overload – over 4 tons overload – serious offence. Serious accident can be caused.”

The appellant is recorded as having said, in mitigation:

“I was taking the load from Molo to Nairobi, did not realise it was that much overloaded. First offence.”

The appellant was fined shs. 1,000/-, and particulars of the conviction were ordered to be endorsed on his licence. He appealed to the High Court on the ground that the sentence, including the order for endorsement, was “harsh and excessive”, and by a supplementary petition of appeal, he put forward the following additional ground of appeal:

“That the order for endorsement is in excess of jurisdiction in terms of s. 76 of the Act and wrong in law.”

The High Court (Ainley, C.J., and Miller, J.) summarily dismissed the appeal against the quantum of the fine, and in a reserved judgment also dismissed the ground of appeal alleging that the order for endorsement was in excess of jurisdiction. The following is the relevant portion of the judgment:

“It is open to the court we think when considering endorsement to look to the facts and to decide whether the accused’s use of the vehicle was in connexion with driving it or otherwise. Here the appellant admitted, we think, that his use of the vehicle lay in the driving of it, and we think that the court below was entitled to endorse his licence.”

From this decision the appellant appealed to this court on the following ground:

“That the order that the particulars of conviction be endorsed on the appellant’s driving licence is in excess of jurisdiction conferred by s. 76 of the Traffic Act and is wrong in law.”

Counsel for the appellant submitted that as the appellant was charged with, and pleaded guilty to, using the vehicle on a road when overloaded, and not

driving it, and as the record does not show that he was in fact driving it, the magistrate had no power to order particulars of the conviction to be endorsed on his licence.

Counsel for the Republic, supported the decision of the High Court. He submitted that the appellant's statement that he was taking the load from Molo to Nairobi was a clear admission that he was driving the vehicle.

With respect, we do not agree that the High Court was entitled to hold, on the record, that the appellant admitted that his use of the vehicle lay in the driving of it. The appellant's words "I was taking the load" are at least equally consistent with his having accompanied the load while the lorry was being driven by some other person. Nevertheless, the appellant unequivocally admitted responsibility for the vehicle being overloaded, and he admitted being with the overloaded lorry while it was being driven on the road from Molo to Nairobi. So far as the offence of using the lorry on the road consisted of the lorry being driven, the appellant was clearly, in our opinion, a principal offender within the meaning of s. 20 of the Penal Code, in that he must have aided and abetted, or counselled or procured, the driver to commit the offence, even if he was not himself the driver. We are accordingly of opinion that the High Court came to a correct conclusion, and that the offence to which the appellant pleaded guilty was an offence in connexion with the driving of a motor vehicle, and that the magistrate had the power to order particulars of the conviction to be endorsed on the appellant's licence.

We accordingly dismiss this appeal.

Appeal dismissed.

For the appellant:

A. R. Kapila & Co., Nairobi

S. S. Rao

For the respondent:

The Attorney General, Kenya

F. P. McLoughlin (State Attorney, Kenya)

Terrah Mukindia v Republic

[1966] 1 EA 425 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	14 November 1966
Case Number:	77/1966
Before:	Sir Charles Newbold P, Duffus Ag VP and Law JA
Sourced by:	LawAfrica
Appeal from:	The High Court of Kenya – Sir John Ainley, C.J., and Madan. J.

[1] Criminal law – Practice – Compensation – Order for payment of substantial sum of money by way of compensation to complainant – Meaning of word “injury” – Circumstances in which order for compensation should be made under s. 31 of Penal Code (K.).

[2] Criminal law – Obtaining money by false pretences – Allegation that cheques obtained for third party and paid into his bank account – Whether obtaining money by false pretences on behalf of third party constitutes offence under Penal Code, s. 313 (K.) – Meaning of word “obtains” in s. 313 Penal Code (K.).

[3] Criminal law – Charge – Money or cheque – Obtaining money by false pretences – Particulars of charge alleging obtaining “Shs. X” – Valid cheques obtained by false pretences – Whether use of symbol “Shs. X” covers a valid cheque – Whether accused embarrassed or prejudiced.

[4] Criminal law – Charge – Irregularity – Charge of obtaining money by false pretences – Words “with intent to defraud” omitted from particulars of offence – Conviction – Whether charge discloses any offence – Whether omission fatal to conviction or curable under Criminal Procedure Code, s. 382 (K.).

Editor's Summary

The appellant was convicted on five counts, all charging the obtaining of money by false pretences contrary to s. 313 of the Penal Code and was sentenced to one year's imprisonment on each count, to run concurrently, and was ordered to pay Shs. 19,846/82 as compensation to the complainant. The gist of the offences charged was that the appellant who managed his father's timber business, obtained from the complainant cheques for varying amounts by representing claims supported by invoices which purported to show that the appellant had delivered quantities of timber to two agents of the complainant, whereas in fact the quantities delivered were considerably less than those shown on the invoices. The cheques were paid into the appellant's father's bank account and in the course of the trial the charges were amended to make it clear that the appellant had received the sums represented by the cheques for his father. On appeal the High Court quashed the conviction on count number 3, but otherwise dismissed the appeal. On further appeal to the Court of Appeal counsel for the appellant challenged the legality of the order for compensation and further argued, firstly that s. 313 of the Penal Code does not make it an offence for a person to obtain by false pretences anything on behalf of another; secondly, that as the appellant was charged, in all counts with obtaining "Shs. X", the use of symbol "Shs." meant that the appellant was charged with obtaining cash, whereas he had obtained a valid cheque in each case; and lastly that as the counts 2 and 5 did not specify an intent to defraud, such an intent being a basic and essential ingredient of the offence of obtaining by false pretences, the result was that the appellant was convicted of offences not known to law and should have been acquitted on those two counts.

Held –

- (i) by s. 175 (1) of the Criminal Procedure Code, a court which imposes a fine can order the whole or part of the fine to be applied in the payment to any person of compensation "for any loss or injury" caused by the offence, but as the appellant was not sentenced to a fine the order for compensation could not have been under this section;
- (ii) the word "injury" in the context of s. 31 of the Penal Code has the meaning given in s. 44 of the Indian Penal Code, that is to say any harm whatever illegally caused to any person, in body, mind, reputation or property;
- (iii) under s. 31 of the Penal Code compensation could be ordered in favour of the person injured by an offence but this section should only be invoked in the clearest of cases, as when a person has suffered a comparatively minor physical injury; or has been deprived of property, or whose property has suffered damage, and such deprivation or damage is of readily ascertainable and comparatively small value;
- (iv) section 31 should not be invoked to award compensation in the nature of substantial damages normally recoverable in a civil suit and the present case was not one in which compensation should have been ordered, particularly in view of the fact that the quantity and value of the timber delivered was in dispute, and the ultimate amount recoverable had not been investigated or adjudicated upon as it would be in a civil suit;
- (v) the word "obtains" in s. 313 of the Penal Code includes obtaining for another, provided that that is what is alleged in the charge;
- (vi) the charge as amended made it clear that the appellant was charged with obtaining various amounts

“for” his father, and such an offence was contemplated by s. 313 of the Penal Code;

- (vii) the use of the symbol “Shs. X” sufficiently covers a valid cheque for that amount, but when it is alleged that a cheque for Shs. X has been obtained, the particulars of the offence should so state; *Menzour Ahmed v. R.* (2) applied.

- (viii) though the particulars of the offence should have referred to cheques and not to shillings, the appellant was under no illusions as to what he was charged with having obtained, and was not prejudiced or embarrassed in any way;
- (ix) the charges in counts 2 and 5 disclosed no offence in law because of the omission of the words “with intent to defraud”, and such defect was not curable under s. 382 of the Criminal Procedure Code and was fatal to the conviction.

Appeal allowed in part. Order for compensation set aside. Convictions on counts 2 and 5 quashed and sentences passed set aside. Convictions and sentences on counts 1 and 4 confirmed.

Cases referred to in judgment:

- (1) *R. v. Lurie* (1951), 35 Cr. App. R. 113; [1951] 2 All E.R. 704.
- (2) *Menzour Ahmed v. R.*, [1957] E.A. 386 (C.A.).
- (3) *R. v. James* (1871), 12 Cox C.C. 127.
- (4) *Matu Gichimu v. R.* (1951), 18 E.A.C.A. 311.

Judgment

Law JA, read the following judgment of the court: This is a second appeal in a case originally tried by the resident magistrate at Meru. The appellant was convicted on five counts, all charging the obtaining of money by false pretences contrary to s. 313 of the Penal Code. he was sentenced to one year’s imprisonment on each count, to run concurrently, and was ordered to pay Shs. 19,846/82 as compensation. The gist of the offences charged was that the appellant, who managed his father’s timber business, obtained from the Meru African Co-operative Union cheques for varying amounts by presenting claims supported by invoices which purported to show that he had delivered quantities of timber to two affiliated societies, whereas in fact the quantities delivered were considerably less than those shown on the invoices. These cheques were paid into the appellant’s father’s bank account. In the course of the trial the charges were amended to make it clear that the appellant had received the sums represented by the cheques for his father. The appellant was not, however, required to plead to these amended charges, in accordance with the requirements of s. 214(1) of the Criminal Procedure Code. Counsel for the appellant, has informed us that this omission did not in fact cause prejudice or occasion a failure of justice, as the appellant would have repeated his original pleas of not guilty, and we accept that this must be the position in the circumstances and treat it as an irregularity curable under the provisions of s. 382 of the Criminal Procedure Code.

The appellant appealed against his convictions and sentences to the High Court, which quashed the conviction on the third count, on the grounds that the false pretence alleged therein might have been a genuine mistake, but otherwise dismissed the appeal. Even the order for compensation was maintained, although counsel for the Republic had conceded, and it was clear from the evidence, that the loss suffered by the complainant was Shs. 13,045/56 and not Shs. 19,846/82, the sum awarded as compensation by the magistrate. Before us, the legality of the award of compensation was challenged, and we propose to examine this question first. By s. 175 (1) of the Criminal Procedure Code, a court which imposes a fine can order the whole or part of the fine to be applied in the payment to any person of

compensation “for any loss of injury” caused by the offence. As the appellant was not sentenced to a fine, the order for compensation cannot have been made under this section. The only other relevant section which we can trace is s. 31 of the Penal Code, which reads:

“Any person who is convicted of an offence may be adjudged to make compensation to any person injured by his offence, . . .”

It is not clear whether the word “injured” relates only to personal injuries or whether it is intended to have a wider application. The word “injury” is not defined in the Penal Code, but we consider that in the context of s. 31 it has the meaning given in s. 44 of the Indian Penal Code, that is to say any harm whatever illegally caused to any person, in body, mind, reputation or property. Nevertheless, we are of opinion that s. 31 of the Penal Code should only be used in the clearest of cases, as when a person has suffered a comparatively minor physical injury; or has been deprived of property, or whose property has suffered damage, and such deprivation or damage is of readily ascertainable and comparatively small value. It should not in our opinion be used to award compensation in the nature of substantial damages normally recoverable in a civil suit. For instance, compensation under s. 31 should not be awarded to a person who has lost a limb as a result of grievous harm done to him contrary to s. 234 of the Penal Code or to a complainant in a successful prosecution for criminal libel contrary to s. 194 of the Penal Code. We do not consider the present case one in which compensation should have been ordered. The quantity and value of the timber under-delivered is in dispute, and the ultimate amount recoverable has not been investigated or adjudicated upon as it would be in a civil suit, in which set-offs and counter-claims might be raised. We accordingly set aside the order for compensation made in this case, and leave the complainant Co-operative Union to pursue its claims in the proper forum for a dispute of this nature, that is to say a civil court.

We now turn to the grounds of appeal. The first is that s. 313 of the Penal Code does not make it an offence for a person to obtain by false pretences anything on behalf of another person. This was undoubtedly so at one time in England, but we do not feel it necessary to follow the historical development of the offence over the past 150 years in England in order to interpret s. 313 which reads as follows:

“Any person who by any false pretence, and with intent to defraud, obtains from any other person anything capable of being stolen, or induces any other person to deliver to any person anything capable of being stolen, is guilty of a misdemeanour and is liable to imprisonment for three years.”

The High Court held that the word “obtains” in this section is used in a limited sense and does not include the meaning “obtains for another”, but they thought that the idea of obtaining “for” a third party was covered by that part of the section dealing with delivery. We would go further. We see no reason why the word “obtains” should be read in the restricted sense contended for by counsel for the appellant. We consider that it includes obtaining for another, provided of course that if this is what is alleged, the charge must be worded accordingly (*R. v. Lurie* (1)). The charges in the present case, as amended, made it clear that the appellant was charged with obtaining various amounts “for” his father, and in our view such an offence is contemplated by, and falls within, s. 313 of the Penal Code.

Another ground of appeal arose out of the fact that the appellant was charged, in all the counts, with obtaining “Shs. X”; whereas what he really obtained in each case was a valid cheque for Shs. X. Counsel for the appellant submitted that the use of the symbol “Shs.” meant that the appellant was charged with obtaining cash, and that the charges were not supported by proof that he obtained valid cheques. Quite clearly the particulars of offence should have referred to cheques, and not to shillings. In *Menzour Ahmed v. R.* (2), this court held that

the words “the sum of Shs. 3,000/-” in a charge of theft sufficiently described a valid cheque for that amount, because a sum of Shs. 3,000/- means a sum of money, and “money” is defined in s. 5 of the Penal Code as including, among other things, cheques. We see no reason to differ from that decision, although counsel for the appellant has invited us to do so in a persuasive argument. In any event, the appellant was under no illusions as to what he was charged with having obtained, and was not prejudiced or embarrassed in any way. We are of opinion that, on the authority of *Menzour’s* case (2), the use of the symbol “Shs. X” sufficiently covers a valid cheque for that amount, although we repeat that when it is a cheque for Shs. X that has been obtained, the particulars of offence should so state.

The substantial ground of appeal arises out of the fact that two of the counts did not specify that the appellant’s false pretences were made with intent to defraud. The words “with intent to defraud” appear in the particulars of offence in the other counts, but were omitted from counts 2 and 5. The High Court held that these words had “clearly been omitted because of a clerical error”, which was curable under s. 382 of the Criminal Procedure Code. Counsel for the appellant has submitted that an intent to defraud is the basic and essential ingredient of the offence of obtaining by false pretences, and that even if the words “with intent to defraud” were omitted because of a clerical error, the result was that the offences with which the appellant was charged and on which he was convicted in counts 2 and 5 were not offences known to the law, and that the appellant should have been acquitted on those counts. There can be no doubt that an intent to defraud is an essential ingredient of the offence of obtaining by false pretences, and that it must be alleged in the particulars of offence in a count charging that offence, see Form 12 in the Second Schedule to the Criminal Procedure Code. The question is, whether the omission of these words is a fatal defect, or a curable irregularity. In *R. v. James* (3), Lush, J., held that such an omission was fatal to the prosecution and quashed the indictment. At the date of *James’* case (3) there was no provision in force similar to the proviso to s. 4(1) of the Criminal Appeal Act, 1907, which corresponds in effect with s. 382 of the Kenya Criminal Procedure Code. Our view is that a charge of false pretences, which does not include an averment that the pretence was made with intent to defraud, is a charge which discloses no offence at law, and is not merely an irregular or defective charge which can be put right by the application of s. 382 of the Criminal Procedure Code. As this Court observed in *Matu Gichimu v. R.* (4) ((1951), 18 E.A.C.A. 311, at p. 316), there is a remarkable absence of direct authority on the point. The judgment of the court goes on to say:

“If, in fact, the charge or information discloses no offence in law, and cannot be or is not sufficiently amended, then either it will be quashed by the court of first instance and an order of acquittal entered or, if a conviction has been recorded, an appellate Court may quash it and substitute an Order of acquittal.”

In our opinion the charges in counts 2 and 5 disclosed no offence in law, a defect which could have been, but was not, corrected by amendment. In the absence of amendment, we consider the defect to be fatal to the conviction, and not one which is curable under s. 382. We accordingly quash the convictions on those two counts, and set aside the sentences passed on those counts. This appeal succeeds to the extent indicated in this judgment. The convictions on counts 1 and 4 are confirmed, together with the sentences passed on those counts.

This case underlines yet again the duty which is placed on magistrates by s. 214(1) of the Criminal Procedure Code, of scrutinizing every charge to ensure that it is not defective in substance or in form, and of making such orders for the

alteration of defective charges, whether by amendment or by substitution or addition of a new charge, as may be necessary.

We would also draw attention to the necessity, where an amendment to a charge is ordered, to make on the original charge the amendment ordered.

Appeal allowed in part. Order for compensation set aside. Convictions on counts 2 and 5 quashed and sentences passed set aside. Convictions and sentences on counts 1 and 4 confirmed.

For the appellant:

S. K. Kapila, Nairobi

For the respondent:

The Attorney General, Kenya

F. P. McLoughlin (State Attorney, Kenya)

Augustino Orete and others v Uganda [1966] 1 EA 430 (CAK)

Division:	Court of Appeal at Kampala
Date of judgment:	28 November 1966
Case Number:	165/1966
Before:	Sir Charles Newbold P, Duffus Ag VP and Law JA
Sourced by:	LawAfrica
Appeal from:	The High Court of Uganda, Sheridan, J.

[1] *Criminal law – Murder – Common intention – Raiding party invading a neighbouring village – Intention to discover cattle thieves and beating them – Murder not a probable consequence of common purpose.*

[2] *Criminal law – Evidence – Previous statements – Bad practice to introduce them when better evidence available.*

Editor's Summary

A large party of villagers, including the three appellants, armed with sticks, being infuriated at the loss of their cattle from frequent acts of stealing, invaded a neighbouring village at night with the intention of discovering the thieves and beating them. Several people were in fact beaten including the deceased whose skull was fractured by a blow from a stick. The trial judge made a finding that the three appellants were members of the raiding party and that they participated in beating the villagers including the

deceased. There was no evidence as to who actually struck the blow which caused the deceased's death but the trial judge convicted the three appellants on the basis that the attackers were animated by a common intention, but he did not make a finding as to what this common intention was. On appeal from conviction of murder it was submitted for the appellants that the intention of the raiding party was to do no more than punish suspected cattle thieves by beating them. The Court observed that the practice of putting in evidence previous statements without any justification in law should be discontinued.

Held –

- (i) it was not established that the raiders, including the appellants, shared a common intention to kill or to do grievous bodily harm, and their conviction for murder on the basis of such common intention could not be supported;
- (ii) the question whether the death of the deceased was a probable consequence of the prosecution of the unlawful purpose of beating suspected thieves was not

considered by the court below and the assessors might well have advised that the death of the deceased arose fortuitously from the deliberate act of an individual, and that it was not a probable consequence of the prosecution of the unlawful common purpose;

- (iii) the convictions of murder against the appellants should be quashed and sentence set aside and as the appellants were clearly guilty of manslaughter convictions of manslaughter should be substituted.

Appeal allowed. Convictions of murder quashed and sentence set aside. Convictions for manslaughter substituted.

No cases referred to in judgment.

Judgment

Law JA, read the following judgment of the court: The three appellants were convicted of murder and sentenced to death by the High Court of Uganda sitting at Soroti. It appears that a large crowd of villagers, including the appellants, being infuriated at the loss of their cattle from frequent acts of stealing, invaded the neighbouring village of Kachochi, at night on December 11, 1965, with the intention of discovering the thieves and beating them. For this purpose they armed themselves with sticks. Several people were in fact beaten, including the witnesses Abdu and Juma, and the deceased Ramazani, whose skull was unfortunately fractured by a blow from a stick. The evidence was, not surprisingly, very confused and full of discrepancies, but the trial judge was satisfied that the three appellants were members of the raiding party, and that they participated in beating the villagers, including the deceased. Counsel for the appellants submitted that in the circumstances of confusion then existing there was need for the greatest care in the identification of each of the appellants, and that the evidence of witnesses for the prosecution was irreconcilable one with the other, a position which the judge appreciated by acquitting two of the accused. He also submitted that the evidence against the appellants was no better than that against those who were acquitted, and that in these circumstances the appellants ought also to have been acquitted. We are satisfied that there was ample evidence of identification, and the fact that the judge was not satisfied with the guilt of some of the accused is not in itself a reason for acquitting the appellants. There was no evidence as to who actually struck the blow which caused Ramazani's death, but the judge convicted the three appellants because, in his words:

“whoever struck the fatal blow the deceased's attackers were animated by a common intention.”

Unfortunately, he made no finding as to what this common intention was. Unless it was to kill or to do grievous bodily harm, the appellants could not be convicted of murder on the basis of common intention. Counsel for the appellants has drawn our attention to aspects of the evidence supporting his submission that the intention of the raiding party was to do no more than punish suspected cattle thieves by beating them. He pointed out that the witnesses Abdu and Juma were beaten, without suffering either death or grievous bodily harm, and he drew attention to an extract from a statement made by Juma to the police, which was put in as Ex. “D”, to the effect that one of the raiding party, Odeke, told the second appellant that it was not good to beat people, and that their duty was to find out where the thieves were. Counsel also referred to the opinions of the assessors, who were directed on the law relating to common intention. They appear to have been of the opinion that the raiding party had no common intention to kill or do grievous bodily harm, because they both advised the

judge that the appellants were guilty of manslaughter. In particular the second assessor is recorded as having said “they didn’t plan to kill the deceased. It is manslaughter”. We find ourselves in agreement with counsel on this aspect of the case. We consider that it was not established that the raiders, including the appellants, shared a common intention to kill or to do grievous bodily harm, and that their conviction for murder on the basis of such a common intention cannot be supported.

The State submitted that the conviction of the appellants could be supported, having regard to s. 22 of the Penal Code, which reads as follows:

“When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”

There can be no doubt that the raiders, on December 11, 1965, were engaged on an unlawful purpose, and that in the prosecution of such purpose Ramazani was killed. Whether the death of Ramazani was a probable consequence of the prosecution of the unlawful purpose of beating suspected thieves seems likely, but we are not prepared to say it necessarily was. The question was not considered in the court below. The assessors might well have advised that the death of Ramazani arose fortuitously from the deliberate act of an individual, and that it was not a probable consequence of the prosecution of the unlawful common purpose, in the peculiar circumstances of this case.

For these reasons we think that the convictions for murder against the appellants in this case should not be allowed to stand; we quash them and set aside the sentences of death passed on the appellants. On any view of the facts, however, the appellants are clearly guilty of manslaughter, in that their unlawful use of force resulted in the death of Ramazani, although that death may not have been intended or anticipated. We accordingly substitute, in the case of each appellant, a conviction for the offence of manslaughter, contrary to s. 182 of the Penal Code, and pass on each appellant a sentence of five years’ imprisonment.

We would like to comment on a matter arising out of the record in this case, and that is the practice, which is becoming prevalent in many courts, of putting in evidence previous statements made by witnesses, without, so far as we can see, any justification in law. For instance, PW2, Lucy Itimat deposed, in her examination-in-chief, that the first appellant, Orete, had come to her house and pulled out her husband. The following is an extract from the record of her cross-examination.

“Next day I made a statement to the police. I told them that Orete came into my house. This is my statement (marked Ex. B). Five days later the police came to our village. I made another statement. This is it. (Marked Ex. C).”

The witness went on to agree that in those statements she had not mentioned Orete by name, because of fear. Why then were the statements made evidence in the case? By s. 143 of the Evidence Act, a previous statement made by a witness may be proved if it is intended to be used to contradict the witness; but in this case the witness had agreed that she had not named the first appellant in those statements; there was accordingly nothing to contradict, and the statements were inadmissible and irrelevant and should not have been put in evidence. In any event previous statements are not, subject to the provisions of s. 155 of the Evidence Act, probative of the matter contained therein. Thus one result of this procedure is to clutter the record with inadmissible matter which has no

evidential value. It is a dangerous practice which at best leads to confusion and possible prejudice, and at worst to trial on unsworn and untested testimony. It must be discontinued.

Appeal allowed. Convictions of murder quashed and sentence set aside. Convictions for manslaughter substituted.

For the appellants:

B. N. Kiwanuka

For the respondent

F. W. Kakembo (State Attorney, Uganda)

Salume Namukasa v Yozefu Bukya
[1966] 1 EA 433 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	28 October 1966
Case Number:	78/1965
Before:	Sir Udo Udoma CJ
Sourced by:	LawAfrica

[1] Practice – Application made by chamber summons – Application should be by notice of motion – Application incompetent – Whether under its inherent power court could exercise its discretionary power under s. 101 of the Civil Procedure Ordinance (U.) – Civil Procedure Rules O. 48, r. 1 (U.).

Editor's Summary

An application was made by chamber summons under O. 9, r. 24 of the Civil Procedure Rules for setting aside an ex parte judgment. A preliminary objection was taken on behalf of the plaintiff that the application was incompetent and misconceived because under O. 48, r. 1 the application should have been by a notice of motion to be heard in open court. For the applicant it was conceded that the application should have been by notice of motion but it was contended that the court should invoke its inherent powers under s. 101 of the Civil Procedure Ordinance and treat the application as properly before it for the purpose of meeting the ends of justice.

Held –

- (i) the application was not properly before the court as the applicant had failed to comply with the provisions of O. 48, r. 1 and must be struck out;
- (ii) the provisions of s. 101 of the Civil Procedure Ordinance could only be invoked if the proceedings have been brought before the Court in the proper way in terms of the procedure prescribed by the

Civil Procedure Rules.

Application struck out.

No cases referred to in judgment.

Judgment

Udo Udoma CJ: This application is by chamber summons and it is so headed. It is brought by Service Trustees Ltd., a limited liability company and the principal agent for the General Accident & Life Assurance Corporation Ltd. The applicants claim to be the insurers of the defendant on record. The subject-matter of the suit between the respondent in this application and the defendant on record was a claim for damages for negligence as a result of an accident.

The present application is by the Insurance Company, the insurers of the defendant on record, but it is brought in the name of the defendant on record.

The application is for an order of this court to set aside the ex parte judgment and decree and the damages assessed and awarded to the respondent in default of the entry of appearance and of the filing of defence by the defendant on record. The judgment was entered and the damages awarded to the respondent pursuant to the provisions of O. 9, r. 6 of the Rules of this Court, on June 26, 1966.

There is however no evidence that the defendant on record was served with a copy of the summons in this application, nor indeed is there any evidence that he knows of it even now.

The chamber summons is worded as follows:

“Let all parties concerned attend the Judge in Chambers at the Law Courts, Kampala, on Wednesday, the 12th of October, 1966, at 9 o'clock in the forenoon when the Court will be moved on the hearing of an application on the part of the defendant: That Judgement be set aside pursuant O. 9, r. 9 on the grounds set forth in the affidavit of Ian Douglas Hunter, sworn at Kampala on the 21st day of July, 1966, annexed hereto, and that the defendant be given leave to defend.

“Dated this 22nd day of September, 1966, at Kampala. This summons was taken out by Mboijana & Co., Counsel for the defendant.”

I have considered it necessary to set out in full the relevant part of the application in view of the objection which was raised by counsel for the respondent.

The matter first came before me in Chambers on October 12, 1966. From the arguments of counsel it emerged that the application could not be dealt with and disposed of summarily as both counsel intimated that they had a number of legal authorities to rely upon in their submissions; and, it appearing that serious points of law, including the question as to the locus standi of the applicant in this court, as well as the rules of the Court requiring construction would be involved; and, as there were then before me several other applications for hearing, I adjourned the application and set it down for arguments in open court on October 18, 1966, both counsel consenting.

On October 18, 1966, the matter came up in open court. In the course of his arguments in reply to the submission of counsel for the defendant, counsel for the respondent, who opposed the application, raised a preliminary objection in point of law as to the competence of the application. He submitted that the application be dismissed on the grounds that it was not properly before the court, and that the same was misconceived as the provisions of O. 48, r. 1 of the Rules of this Court had not been complied with. Counsel further contended that as the counsel for the applicant had conceded rightly that the application was brought under O. 9, r. 24 of the Rules of this Court for an order of the court in the exercise of its powers to set aside the judgment and damages awarded to the respondent, the application ought not to have been brought by chamber summons but by motion on notice in terms of the provisions of O. 48, r. 1 of the Rules of this Court.

Counsel for the respondent then applied for a ruling by the court on the points of objection raised before the application could be examined on its merits.

I then assured counsel that, when considering my decision on the application, I would consider it my duty to deal with the preliminary point of objection raised first.

Counsel for the applicant, while conceding that as the application was brought under O. 9, r. 24 for the exercise of the powers of the court, under O. 9, r. 9 of the Rules of this Court, it was defective for noncompliance with the requirements of O. 48, r. 1 of the Rules of this Court, nevertheless submitted that it was

competent for the court still to exercise its discretionary powers under the provisions of s. 101 of the Civil Procedure Ordinance and O. 47, r. 6 of the Rules of this Court.

On the preliminary objection raised by counsel for the respondent, the section of the Rules relied upon is headed: Motion and other Applications, and O. 48, r. 1 thereof reads:

- “1. All applications to the Court, save where otherwise expressly provided for under these Rules, shall be by motion and shall be heard in open Court.”

And O. 9, r. 24 of the Rules under which the application has been brought to set aside the ex parte judgment entered in favour of the respondent is in the following terms:

- “24. In any case in which a decree is passed ex parte against a defendant he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called for hearing; the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court, or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit; Provided that, where the decree is of such a nature as it cannot be set aside as against such defendant only, it may be set aside as against all or any of the other defendants also.”

Thus from the provisions of the Rules set out above, it is clear that the mode or procedure by which an application under O. 9, r. 24 may be brought before this court has not been “expressly provided for”. That being so, there is no doubt whatsoever that, as rightly conceded by counsel for the applicant, this application ought to have been brought by motion and not by chamber summons.

The application is therefore not properly before this court as the applicant has failed to comply with the provisions of O. 48, r. 1 of the Rules of this Court. Although this point was raised and argued at length by both counsel, no leave of this court was sought either to amend or withdraw the application by counsel for the applicant. In my view the defect is a serious one. It goes to the very root of the application and, as far as this court is concerned, there is no competent application before it.

It was submitted by counsel for the applicant that despite this defect in that the application was not properly before the court, the court should invoke its inherent powers under s. 101 of the Civil Procedure Ordinance and treat the application as properly before it for the purpose of meeting the ends of justice.

It was difficult to appreciate the point of this submission, having regard to the provisions of s. 101 of the Civil Procedure Ordinance. It seems to me that before the provisions of that section of the Ordinance can be invoked the matter or the proceedings concerned must have been brought before the court, the proper way in terms of the procedure prescribed by the Rules of this Court. In the present case the application has not been brought before this court in the manner prescribed by law.

Counsel must understand that the Rules of this Court were not made in vain. They are intended to regulate the practice of the court. Of late a practice seems to have developed of counsel instituting proceedings in this court without paying due regard to the Rules. Such a practice must be discouraged. In a matter of this kind, might the needs of justice not be better served by this defective, disorderly and incompetent application being struck out?

My ruling, therefore, on the preliminary objection on point of law raised by the counsel for the respondent is that this application is not properly before the Court and must be struck out. It is accordingly struck out with costs to the respondent. Order accordingly.

Application struck out.

For the respondent:

Sebalu & Co., Kampala

L. Sebalu

For the applicant:

Binaisa Mboijana & Co., Kampala

Bickford Smith

Meru Farmers Co-operative Union v Abdul Aziz Suleman (No. 1) [1966] 1 EA 436 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	12 October 1966
Case Number:	7/1966
Before:	Newbold P, Duffus Ag VP and Spry JA
Sourced by:	LawAfrica
Appeal from:	The High Court of Kenya – Madan, J.

[1] Practice – Striking out – Plaintiff claiming goods sold and delivered against two defendants – Facts pleaded refer to second defendant as agent – Claim by second defendant that plaintiff does not disclose a cause of action – Reply filed seeking to make second defendant principal – Whether court can consider defence and reply when deciding the issue of cause of action – Civil Procedure (Revised) Rules, 1948, O. 6, r. 29 (K.).

[2] Practice – Pleading – Amendment – Court of Appeal – Application to amend plaintiff – Specific amendment not submitted – General approval sought to make any amendment – Practice in allowing amendments.

Editor's Summary

The respondent had filed a suit in the High Court of Kenya against the appellant as second defendant and another co-operative society as first defendant. The claim was for goods sold and delivered to the first defendant and also for charges for transport done for the same defendant. There was an allegation that these goods were supplied and transport work done on the appellant's order and the respondent had

averred that payments had been made from time to time by the appellant but that it had debited these sums to the first defendant who had initially ordered the goods and received deliveries. The appellant field a defence pleading that the plaint disclosed no cause of action against it but also stated without prejudice to this defence that it had issued on behalf of the first defendant the written orders alleged. The appellant at the same time filed a notice of motion under O. 6, r. 29, applying for the plaint to be struck out in so far as it sought relief against it for failure to disclose any cause of action against it. Subsequently, the respondent filed a reply to the appellant's defence and sought to add to the averments and claim as set out in the plaint and to make the appellant liable as principal. The High Court held that the plaint disclosed a reasonable cause of action against the appellant and dismissed the application. The appellant thereupon appealed and counsel for the respondent argued that the reply to the appellant's defence should be taken into account when determining whether a cause of action has been reasonably disclosed in the plaint, and further, that it

was too late to strike out the plaint as the appellant had by filling his defence joined issue in the matter. Counsel also applied for leave to amend the plaint but sought a general approval from the court to make any amendment which he might think fit.

Held –

- (i) it would normally be preferable to make the application to strike out a plaint on the ground that it discloses no reasonable cause of action promptly and if possible, prior to filing a defence; but the failure to adopt this course will not necessarily result in the application being rejected and the court has a discretion to examine the application in the light of the circumstances: *Empire Investments v. Madalali*, E.A.C.A. Civil Appeal No. 20 of 1965 (unreported);
- (ii) the averments in the plaint clearly disclosed that the respondent was dealing with the first defendant as a principal and any reference to the appellant as second defendant could only have been in the character of agent;
- (iii) having regard to the express facts pleaded, it was not possible to say that the plaint disclosed any reasonable cause of action against the appellant;
- (iv) in deciding this issue it was not proper to look at the defence and the reply, since what was sought to be struck out was the plaint; it was the plaint which initiated the proceedings and the proceedings could not be allowed to continue unless the plaint disclosed a reasonable cause of action;
- (v) when application is made for leave to amend, the particular amendment in respect of which leave is sought should be before the court and only in exceptional circumstances should a court give leave to amend without knowing the particular amendment for which leave was asked.

Appeal allowed. Order that the plaint be struck out as against the second defendant.

Cases referred to in judgment:

- (1) *Empire Investments v. Madalali*, E.A.C.A. Civil Appeal No. 20 of 1965 (unreported).

The following judgments were read:

Judgment

Duffus Ag VP: This is an appeal against the ruling of a judge of the High Court refusing to strike out the plaint, in so far as it sought relief against the second defendant, and dismiss the suit against that defendant.

The respondent in this case brought this action against two defendants both co-operative societies, that is (1) the Igembe Farmers Co-operative Society Ltd., and (2) the appellant, the Meru Farmers Co-operative Union Ltd. The material paragraphs of the plaint state:

“The plaintiff above-named states as follows:

1. The plaintiff’s claim is for the sum of Shs. 25,387/50 being the balance of the price of building materials, agricultural and other goods sold and delivered to and charges for transport done by the plaintiff for the First defendant upon the orders of the second defendant save in one case, at Meru in Kenya, deliveries having been effected at Meru, during the years 1964 and 1965, particulars whereof

are annexed hereto and marked 'A'.

2. Payments have been made from time to time by the second defendant, but the plaintiff has debited the sums due, to the first defendant, who initially ordered the goods and received deliveries thereof. The plaintiff is in doubt as to which of the defendants is liable, and to what extent,

more particularly in the one case aforesaid in respect of which no written order from the second defendant exists.

3. . . .

4. Despite demand and notice of intention to sue, the defendants neglect and/or refuse to pay.

Wherefore the plaintiff prays for:

- (a) Judgment for Shs. 28,506/50 or for other several sum against one or both defendants according to their respective liabilities;
- (b) Interest at court rates from date hereof till payment in full;
- (c) Costs of this suit with interest at 6 per cent. per annum thereon from the date of ascertainment by taxation until payment;
- (d) Further or other relief.”

The third paragraph contains a claim only against the first defendant. Defences were then duly and separately filed by each defendant. On the same day that the second defendant filed its defence it also filed a notice of motion under O. 6, r. 29 asking that the plaint be struck out in so far as it sought relief against that defendant as it did not disclose any cause of action against the second defendant and also asking that the suit against the second defendant be dismissed with costs. In its defence the second defendant pleaded that no cause of action was disclosed as set out in the notice of motion but also stated without prejudice to this defence that the second defendant admitted that it had issued on behalf of the first defendant the written orders listed in the second column of the annexures to the plaint but did not admit any of the other allegations in the plaint.

Subsequent to the filing of the defence and the notice of motion the respondent filed a reply to the second defendant’s defence. In this reply the respondent sought to add to the averments and claim as set out in the plaint and to make the second defendant liable as a principal. I do not propose to set out this part of the reply as I agree with counsel for the appellant for reasons which I will later state that this reply cannot affect the motion to strike out the plaint and that the reply is only relevant in so far as it affects the question of this court now allowing an amendment to the plaint. In this respect para. 6 of the reply is relevant. Paragraph 6 reads as follows:

- “6. In view of the first defendant’s admission of sole liability (without accepting the contention that the first defendant was or is solely liable or that there was no reasonable doubt as to which of the two defendants was liable) the plaintiff will not seek as against the second defendant (who was reasonably and properly joined, and whose liability may well exist as aforesaid) either judgment in the alternative or for any portion of the claim or for interest thereon or for costs of the suit.

Wherefore the plaintiff prays, no costs be awarded to the second defendant alternatively, if any costs are awarded to the second defendant to date hereof, they should be awarded for reasons aforesaid directly against the first defendant, who alternatively, in the event of such costs being awarded against the plaintiff, should be ordered to re-imburse the plaintiff in respect of them.”

The application now before us was brought under the provisions of O. 6, r. 29. Under this rule “the court may, upon application, order any pleading to be struck out on the ground that it discloses no reasonable cause of action . . . and, in any such case, . . . may order the suit to be stayed or dismissed or judgment to be entered accordingly as may be just”. The learned trial judge

found that the plaint disclosed a reasonable cause of action against the second defendant and dismissed the application.

In considering the application the learned judge correctly advised himself on the law and as he states the remedy provided by r. 29 should only be exercised in plain obvious cases and where it is not possible to allow an amendment to the plaint. It is however, clear that the plaint must, as required by O. 7, r. 1 set out the facts upon which the plaintiff alleges that the cause of action arises against a defendant, and subject to the power of amendment then if the plaint discloses no reasonable cause of action, the court, on application being made should act under r. 29 and strike out the plaint. The main consideration in this appeal is simply whether the facts as set out in the plaint disclose a reasonable cause of action against the second defendant. This is a claim for goods sold and delivered, and also a claim for transport. Paragraph 1 of the plaint states that the plaintiff is claiming the balance due on goods sold and delivered by him to the first defendant and also a balance for charges for transport done by the plaintiff for the first defendant. Here are facts setting out the complete cause of action against the first defendant. The only allegations here against the second defendant are that these goods were supplied and transport work done on the second defendant's order.

The second paragraph then sets out the facts that payments have been made on the account from time to time by the second defendant, but that the plaintiff has debited the sums due to the first defendant who initially ordered the goods and received deliveries. Here the facts pleaded are that the plaintiff regarded the first defendant as the society with whom he was dealing and in whom liability rested. The fact that payments were made by the second defendant will not of itself make that defendant liable on the contract. The fourth paragraph states that the defendants have neglected or refused to pay and then sets out the plaintiff's claim.

Taken as a whole the plaintiff's claim against the first defendant is clear. This is the society that the plaintiff entered into the contract with, that originally ordered the goods, and that received these goods and in whose name the plaintiff opened an account. The plaintiff's claim against the second defendant as shown in the pleadings is that it ordered the goods, but it appears that it did so as agent for and on behalf of the first defendant, and then further that the second defendant made payments on account, but here again according to the second paragraph, it did so on behalf of the first defendant and the plaintiff accepted this fact and actually entered this in his books against the first defendant's account. The plaintiff has not claimed against the second defendant as a principal nor has he, in my view, shown any cause of action in his plaint against the second defendant. I therefore, cannot, with respect, agree with the learned judge that there are sufficient facts pleaded here to admit of any of the possibilities that the learned judge envisaged except by the addition of further facts, against the second defendant, which have not been pleaded.

Two other questions were raised by counsel for the respondent. He submitted that the reply to the defence should be taken into account, here I entirely agree with the submission of counsel for the appellant that a reply cannot be considered in determining whether a cause of action has been reasonably disclosed in the plaint. The rule as to departures under O. 6, r. 6 would apply whereby no pleading shall, except by way of amendment, raise any new ground of claim inconsistent with a previous pleading of the same party, and there is further the fact that this reply was filed after the motion to strike out and that the reply does not seek to amend the plaint.

Counsel for the respondent also submitted that it was too late to strike out the plaint as the second defendant had, by filing his defence, joined issue in the

matter. Here again I cannot agree with this submission. The second defendant pleaded in his defence the fact that no cause of action was disclosed and at the same time he filed this motion to strike out the plaint under O. 6, r. 29. It is difficult to see how else the second defendant could have protected his position under the rules without having to come back to the court for leave to file his defence out of time in the event of his not succeeding on the motion under r. 29.

There is further the question of amendment. An amendment should be granted whenever possible, and I am of the view that this would have been a proper case to grant leave to amend but for the fact that the plaintiff has already decided not to proceed further against the second defendant. I would for this purpose refer to para. 6 of the plaintiff's reply which I have already set out. It would be wrong for this court to now grant an amendment and put the parties to further expenses for a completely useless purpose. Counsel for the respondent submitted that he desired to keep the second defendant as a party to the suit for the purposes of being able to obtain an order for discovery or inspection of documents and further in order to ensure that the first defendant paid the costs that the second defendant incurred. With respect, I cannot see how either of these two purposes could possibly be a valid reason for keeping a defendant, against whom no cause of action has been pleaded, in as a party to a suit.

I would therefore allow this appeal and set aside the judgment of the learned trial judge and in lieu thereof substitute an order granting the motion and ordering that the plaint be struck out in so far as it seeks relief against the second defendant, and that the suit against the second defendant be dismissed with costs, these costs and also the costs of the application to be paid by the respondent. The respondent to also pay the costs of this appeal.

Sir Charles Newbold P: The facts are stated in the judgment of Duffus, Ag. V.-P., and I see no necessity to restate them. Three issues arise for consideration. First, whether the application to strike out the plaint under O. 6, r. 29, should be rejected because it had been filed contemporaneously with the defence; secondly, whether the facts alleged in the plaint disclose any reasonable cause of action; and, thirdly, whether leave to amend should be given.

As regards the first issue, I think that it would normally be preferable to make the application to strike out a plaint on the ground that it discloses no reasonable cause of action promptly and, if possible, prior to filing any defence (see *Empire Investments v. Madalali* (1)). I do not, however, consider that failure to adopt this course will necessarily result in the application being rejected and the court has a discretion to examine the application in the light of the circumstances. In this case the application was filed contemporaneously with the defence and I see no reason why this fact of itself should result in its rejection. As regards the second issue, the facts averred in the plaint were that, following the initial ordering of the goods by the first defendant, the goods were sold to that defendant, delivery was made to it and the sums due for the goods were debited to the first defendant. It was also averred that most of the goods were ordered by the second defendant who from time to time made payments. It is quite clear from the first paragraph of the plaint that the goods were sold and delivered to, and the transport was done by the plaintiff for, the first defendant. These averments disclose clearly that the plaintiff was dealing with the first defendant as a principal and any reference to the second defendant could only be in the character of agent. Having regard to the express facts pleaded it is not, I think, possible to say that the plaint discloses any reasonable cause of action against the second defendant. With respect to the trial judge, the possibilities which he considered might be inferred from the plaint were at variance with the specific allegations of fact and, therefore, were possibilities which could not reasonably be drawn from the plaint. As it was expressly pleaded that goods were sold and delivered to one person it is not a reasonable

possibility to infer that they were sold and delivered to another person. I consider that the plaintiff discloses no reasonable cause of action against the second defendant. It was submitted that in deciding the issue not only should the plaintiff be looked at but also the defence and the reply. I do not consider that it would be proper to do so. What is sought to be struck out is the plaintiff. It is that which initiates the proceedings and the proceedings cannot be allowed to continue unless the plaintiff discloses a reasonable cause of action.

As regards the third issue, notwithstanding the fact that this matter was heard on appeal, the plaintiff did not see fit to produce to the court the particular amendment which he was asking leave to make. Instead he sought, general approval from the court to make any amendment which he might think fit. I consider that when an application is made for leave to amend, the particular amendment in respect of which leave is sought should be before the court and that it should only be in very exceptional circumstances that a court should give leave to amend without knowing the particular amendment for which leave was asked. The plaintiff also submitted that where an application to strike out a plaintiff was granted the practice of the court is to give general leave to amend within a specified period, whether or not such leave was asked for. He cited no authority in support of this. I need hardly say that this is neither the practice nor the law. If application for amendment is made a court should normally give leave to amend unless the amendment would work injustice to the other party or would completely alter the character of the proceedings. I do not, however, think this to be a case in which leave to amend should be granted. As I have already said, I am unaware, even at this late stage, of the amendment in relation to which leave is sought. In any event I can see no possible ground for granting leave to amend, which amendment must be with the object of alleging facts to found a cause of action against the second defendant, when in the reply of the plaintiff there is a specific statement that "The plaintiff will not seek as against the second defendant . . . either judgment in the alternative or for any portion of the claim or for interest thereon or for costs of the suit".

For these reasons I agree with Duffus, Ag. V.-P. that the appeal should be allowed and an order will be made in the terms proposed by him.

Spry JA: I also agree.

Appeal allowed. Order that the plaintiff be struck out as against the second defendant.

For the appellant:

Kaplan & Stratton, Nairobi

W. S. Deverell

For the respondent:

Khanna & Co., Nairobi

D. N. Khanna

Meru Farmers Co-operative Union Ltd v Abdul Aziz Suleman (No. 2)
[1966] 1 EA 442 (CAN)

Division: Court of Appeal at Nairobi

Date of judgment: 23 September 1966
Case Number: 5-12/1966
Before: Sir Charles Newbold P, Duffus Ag VP and Spry JA
Sourced by: LawAfrica

(Reference to the full court from a decision of LAW, J.A.)

[1] Practice – Court of Appeal – Extension of time to lodge appeal – Whether “sufficient reason” shown to extend time – Series of cases between same parties – Cases consolidated for purposes of hearing – Point in issue in each case same – Series of applications to extend time for lodging appeal until after decision of court delivered in appeal which had been filed – Discretion of court – Applicant in a position to file record in time – Eastern African Court of Appeal Rules, 1954, r. 9 (1).

[2] Costs – Court’s discretion when costs can be saved – Court should be keen to save costs.

Editor’s Summary

The respondent filed a series of cases against the appellant and they were consolidated for the hearing in the High Court. The point at issue in all the cases was the same. The High Court gave judgment against the appellant who then made a series of applications each asking that the time for lodging the record of appeal in all the intended appeals to which the applications related should be extended until thirty days after delivery of judgment of the court in an appeal which had been filed. The applications were heard by a single judge who expressed some reluctance at having to refuse them, but was of the opinion that he had no power under r. 9 (1) of the Eastern African Court of Appeal Rules, 1954, to grant the applications. In the affidavits supporting the applications it was stated, without contradiction, that there would be a substantial saving of costs to both parties and no injustice would be done to either if the applications were granted. On a reference to the full court it was contended for the respondent that the words “sufficient reason” in r. 9 could not cover this case where the applicant was in a position to file his record in time and did not do so merely because the point at issue was covered by some other appeal.

Held –

- (i) The court had jurisdiction to entertain the applications;
- (ii) The due administration of justice requires the court to ensure that unnecessary expenses should not be incurred by the litigant and the fact that unnecessary expense will be incurred by filing the record of an appeal which can physically be filed in time is not merely a sufficient reason but very good reason for granting the extension, so long as the extension would not work an injustice in any way;
- (iii) The granting of extension in the circumstances of this case would operate most properly for the due administration of justice and the applications should be granted.

Reference allowed and the order of the judge recalled.

Judgment

Sir Charles Newbold P: This is a reference to the full court from a decision of a single judge of this court given on a series of applications each asking that the time for lodging the record of appeal in all the intended appeals

to which the applications relate should be extended until thirty days after the delivery of the judgment of this court on an appeal which at that time had not been numbered but which now has been numbered.

When these applications came before the single judge he expressed some reluctance at having to refuse them, but in his opinion he did not have power under r. 9 (1) of the Eastern African Court of Appeal Rules, 1954, to grant the applications. Speaking for myself, I understand the decision of the learned Justice of Appeal to make it quite clear that had he considered that he had power to grant the applications, he would have exercised his discretion and granted them. It is not to me quite clear whether Law, J.A., rejected the applications on the ground of lack of jurisdiction or on the ground that, on his interpretation of r. 9 (1), he did not have power to accede in the particular circumstances to the applications. Any question of jurisdiction has now disappeared because both counsel – and I think rightly beyond question – conceded that this court has jurisdiction to entertain the applications. The sole point then that remains is whether this court can regard the particular circumstances of these applications as sufficient reason to extend the time in which the records of appeal should be lodged. This requires consideration of the particular circumstances of the cases.

To each of the applications asking for the extension of time was appended an affidavit. From this it appears that in each of the cases which were heard before the High Court and in which judgment was given and which is now the subject of dispute, the point at issue, so far as the applicant in this application is concerned, was precisely the same. Indeed, the cases were consolidated for the purposes of hearing before the judge of the High Court. One of those cases is the subject of the appeal to which I have referred. In the affidavits supporting the applications relating to the other cases there is a statement, which has been uncontradicted, that there would be a substantial saving of costs to both parties and no injustice would be done to either if the applications were granted. It seems to me that that is the undisputed statement of the position. The courts should always be extremely anxious to ensure that the due administration of justice does not cause unnecessary expenses. If any course of action which either litigant chooses to adopt would result in unnecessary expense, the courts should be zealous to ensure that such a course of action is not open. A court should, above all, be most careful to ensure that it should not itself be used as a tool to incur unnecessary expenses where it is satisfied that such expense is unnecessary.

Now the argument before us on this reference turned upon the question whether in the circumstances which I have set out and which appear from the supporting affidavits, it can be said that there is sufficient reason to extend the time. May I pause here to deal with one point which counsel for the respondent made. He submitted, rightly, as a matter of law, that the court on an appeal, and presumably on a reference of a single judge, will not interfere with the exercise of the discretion of the judge from whom the appeal or reference is brought unless it is clear that the judge was wrong and had exercised his discretion on improper grounds. He submitted here that Law, J.A., had exercised his discretion and rejected the application. May I, as regards this point, repeat what I said earlier, I read the ruling of Law, J.A., as making it quite clear that he would have exercised his discretion and granted the applications if he could have exercised it. Consequently it does not seem to me that this case raises in any way a question of interference with the discretion of the judge from whom the reference is brought. The sole question is; do the circumstances relating to these applications come within the words of r. 9 of the Rules of this court and do they provide sufficient reason for an extension of time?

No authority has been quoted to this court relating to precisely similar circumstances, and counsel for the respondent has urged forcefully that the words “sufficient reason” cannot cover a case where the applicant is clearly in a position to file his record in time and does not do so merely because the point at issue is being covered by some other appeal. If one were to look at the rule narrowly it may be there is something to be said for that point of view. These rules, however, are procedural rules. They are rules which are designed to assist the court in carrying out its functions in the due administration of justice. The due administration of justice, as I have already said, requires the court to ensure that unnecessary expenses should not be incurred by the litigant. To my mind the fact that unnecessary expense will be incurred by filing the record of an appeal which can physically be filed in time is not merely a sufficient reason but very good and proper reason for granting the extension, so long as it is perfectly clear that that extension would not work an injustice in any way.

Counsel for the respondent submitted that it might work as injustice because a successful litigant is entitled to the fruits of the judgment which he has obtained. It seems to me that any right which a litigant has in a judgment is no more affected or prejudiced by granting an extension of the time required for an appeal to be filed than by requiring the appeal to be filed. In fact I can see no possible advantage to the successful litigant before the High Court in forcing him to be a party to appeal proceedings instead of allowing him to sit back and await the result of other appeal proceedings in which he is concerned, on the understanding, of course, that if he is not prepared to abide by the result of those other proceedings then, at that stage, he may have the temerity to insist that the particular proceedings should also be subject to appeal. His right in the judgment is no more affected or prejudiced by granting these applications than by refusing them. To my mind the requirements of this rule, that is, r. 9 (1), which says that the court shall have power for sufficient reason to extend the time for lodging the record of the appeal, have been amply satisfied in the circumstances set out here. With the greatest respect to Law, J.A., I think he erred in coming to the conclusion that “it would not be proper to use r. 9 (1) for the purpose of delaying the filing of a record of appeal which could be filed in time, however praise-worthy the motive”. In my view this procedural rule gives ample power to the court to extend the time in circumstances where such an extension of time would operate most properly for the due administration of justice. I consider, on the facts before the court, that this is the position here and that the applications should have been granted.

For these reasons I would allow reference and recall the order of Law, J.A., and instead on each of the applications Nos. 5-12 inclusive of 1966, grant an order in the terms that the time within which the records of appeal in each of those cases should be lodged should be extended in each case by thirty days from the date of the delivery of the judgment of this court on the appeal No. 7 of 1966.

Duffus Ag VP: After full consideration of these applications I agree with the view that the learned President has expressed, and that my brother Spry, J.A. agrees with, that these applications should be granted. I considered whether the fact that the rules do not specifically allow applications of this nature, meant that this court should not act under the powers given by r. 9 (1). The main consideration is whether sufficient reason for the extension of time has been shown in those cases. The only reason is that there will be a substantial saving of costs to both parties. This court exists for the purpose of doing justice to the inhabitants of the country and in granting these applications, I think that we are doing justice to both parties by saving unnecessary costs. There is no precedent to this application. As far as my experience goes in cases of this

nature there is usually by consent a stay of proceedings pending the hearing of the appeal in the selected case. In this case I note my brother LAW, J.A., had suggested that some agreement to that effect might have been arrived at between the parties but this was not done. This is a proper case in which we should exercise our discretion as sufficient reasons have been shown, to grant the applications for extension of time pending the hearing of the appeal now duly lodged. I agree with the learned President.

Spry JA: I also agree with the judgment of my Lord the President.

President: The order of the court is that the costs to be costs in the cause of intended appeal in each case if such appeal filed and determined. If no appeal is filed in any case, then liberty to apply to a single judge of this court for an order as to costs.

Reference allowed and the order of the judge recalled.

For the appellant:

Kaplan & Stratton, Nairobi

W. S. Deverell

For the respondent:

Khanna & Co., Nairobi

D. N. Khanna

Grace Stuart Ibingira and others v Uganda [1966] 1 EA 445 (CAK)

Division:	Court of Appeal at Kampala
Date of judgment:	8 December 1966
Case Number:	173/1966
Before:	Sir Charles Newbold P, Duffus Ag VP and Law JA
Sourced by:	LawAfrica
Appeal from:	The High Court of Uganda – Keatinge, J.

[1] *Habeas corpus – Nature and procedure in Uganda defined – Applicants arrested under Deportation Act – Subsequent order for release – Applicants then brought into Buganda where emergency powers of detention applied – Applicants released but detained immediately under emergency powers – Judicature Act (Cap. 34), s. 2 (U.).*

[2] *Criminal law – Practice – Habeas corpus – Procedure in Uganda – Whether criminal or civil.*

[3] *Evidence – Affidavit – Improper to allege bad faith of deponent without cross-examining him.*

[4] *Court of Appeal – Jurisdiction – Habeas corpus – Court will assume jurisdiction if parties accept*

that it has jurisdiction.

Editor's Summary

The five appellants, ministers of the Government and citizens of Uganda, were arrested in Entebbe at the end of February and detained outside Buganda under the Deportation Act. Applications for writs of habeas corpus on their behalf were eventually granted by Fuad, J. on July 15, after the Court of Appeal had, on July 14, remitted the proceedings to the High Court with a direction that a writ be issued. In the meanwhile arrangements were made by the police, as a result of the direction of the Court of Appeal and in anticipation of the proper order of the High Court, to have the detainees brought before the court. After their arrival by air and some delay the Permanent Secretary to the Ministry

of Internal Affairs informed them of the judge's order and that they were free; but on leaving the airport building each of the appellants was served with a detention order dated July 15, 1966, made by the Minister of Internal Affairs under the provisions of the Emergency Powers (Detention) Regulations, 1966, which applied only within Buganda. On August 20, 1966, applications in the form of summonses, supported by affidavits and numbered as Miscellaneous Criminals Applications, were made on behalf of the detainees to the High Court claiming that the further detention was unlawful and that the Regulations were ultra vires the Emergency Powers Act, 1966 and art 30 (5) of the Constitution of Uganda. The summonses were dismissed by Keatinge, J., holding that the Government had not acted in bad faith in bringing the appellants to Entebbe and not releasing them immediately. He further held that it was irrelevant whether the appellants had been illegally arrested and brought into Buganda. The appellants appealed on the grounds that the judge had erred in not holding that the five appellants were brought to Entebbe in bad faith and that in any event it was not open, having regard to the order of FUAD, J., ordering their immediate release, to the Government of Uganda to bring the appellants from wherever they were against their will into Buganda and validly detain them. The Solicitor General challenged the procedure adopted and asked the court to set out in its judgment the proper procedure in relation to the issue and return of a writ of habeas corpus.

Held –

- (i) where the liberty of a person is in issue the Court of Appeal will assume jurisdiction without further inquiry if the parties accept that it had jurisdiction;
- (ii) the court saw absolutely no reason to differ from the finding of Keatinge, J., that the authorities had not acted in bad faith in bringing the appellants to Entebbe before releasing them; it was improper to allege bad faith of a deponent unless the deponent was called for cross-examination;
- (iii) the appellants were already in detention when arrangements were made for them to be brought within Buganda and those arrangements were made not with the object of creating a right of further detention but with the object of complying with what was properly assumed would be the order of the court;
- (iv) the appellants were fortuitously within an area which enabled the minister to issue the detention orders under the Defence Regulations after their release from their former detention;
- (v) the action of Fuad, J., following the previous decision of the Court of Appeal, in ordering the immediate release of the appellants without requiring them to be produced before the court was erroneous;
- (vi) any application for the writ of habeas corpus ad subjiciendum and subsequent proceedings would normally be civil proceedings; being criminal only if, should the applicant not be released, the immediate result would be either his trial on a criminal charge or his return to prison to serve a sentence;
- (vii) the proceedings in this appeal, though treated as criminal proceedings, should have been civil proceedings;
- (viii) by reason of s. 2 of the Judicature Act (Cap. 34) the High Court of Uganda had jurisdiction to issue the writ of habeas corpus in conformity with the common law and statutes of general application in England on August 11, 1902, subject to such qualification as the circumstances of Uganda may render necessary;

- (ix) the circumstances of Uganda did not require any distinction to be drawn between writs issued under the common law or those issued under any of the English Habeas Corpus Acts: the procedure and the nature of the writ should

be the same in each case, that is to say it should be initiated by an ex-parte motion supported by an affidavit.

Appeal dismissed.

Cases referred to in judgment:

- (1) *Emperor v. Savarkar* (1911), Bom. 142.
- (2) *Ex parte Lannoy*, [1942] 2 K. B. 281.
- (3) *R. v. Larssonneur* (1933), 24 Cr. App. Rep. 74.
- (4) *Shah's Application* (1955), 22 E.A.C.A. 381.

Judgment

Sir Charles Newbold P, read the following judgment of the court: This appeal raises most important questions relating to the right of a citizen of Uganda to challenge the validity of an act of the executive government whereby he is detained against his will, and to the means by which he may bring that challenge before the courts.

The relevant facts are as follows. On February 22, 1966, the five appellants, who are citizens of Uganda and were at that time Ministers of the Government of Uganda, were arrested at Entebbe. On February 23, 1966, warrants were issued and executed for their arrest under the Deportation Act (Cap. 308). On March 7, 1966, an affidavit was sworn by counsel for the appellants setting out that he was the advocate for the five appellants and that he had been instructed to apply for habeas corpus on their behalf. After setting out facts relating to their arrest it contained para. 10 in the following form:

“That in view of what is stated above and pursuant to s. 349 of the Criminal Code I humbly pray to this honourable court to issue forthwith a writ directing the Commissioner of Prisons, Uganda, and to the officers and/or authorities who may have control and/or custody of the five applicants to have their bodies brought before this honourable court immediately after the receipt of such writ to answer, undergo and receive all and singular such matters and things as this honourable court shall then and there consider of and concerning them in this behalf.”

At or about the same time other affidavits were sworn setting out other matters. It is not clear whether any formal application to the court was filed in respect of which these affidavits were in support. Whatever the procedure, on March 14, 1966, the matter came before a judge of the High Court in Chambers who then adjourned it into court; and thereafter the proceedings were treated as an application for a writ of habeas corpus. When the matter came before Fuad, J., in court, counsel appeared for the appellants and, according to the record, the Deputy Director of Public Prosecutions and a Senior State Attorney appeared for the respondent, though it is not clear who the respondent was. Argument then took place in which it appeared that the appellants challenged the validity of their detention on two main grounds, the first being that they were unlawfully arrested and detained even if the Deportation Act was valid, and the second was that in any event the Deportation Act was invalid. Having regard to the provisions of the Constitutional Cases (Procedure) Act (Cap. 66), Fuad, J., enquired only into the first of those grounds and on the same day he held that, apart from the constitutional issue, the appellants were lawfully arrested and detained but he directed that the second issue, as it involved a question of the

interpretation of the constitution, be determined by a Bench of three judges of the High Court in accordance with the provisions of the Constitutional Cases (Procedure) Act. This second issue accordingly came before a Bench of three

judges of the High Court and on April 1, 1966, that court held that the Deportation Act was void as being inconsistent with any of the provisions of the Constitution and that the application for a writ of habeas corpus failed.

Notice of appeal to this court was then given against the decision of the full Bench of the High Court dismissing the application for a writ of habeas corpus. The appeal came before this Court with the Sovereign State of Uganda being described therein as the respondent. The proceedings from their inception in the High Court were regarded as being on the criminal side and were given numbers as Miscellaneous Criminal Applications. On appeal to this court they were treated as a single criminal appeal.

Having heard arguments, this court on July 14, 1966, allowed the appeal, held that the Deportation Act was void by reason of being inconsistent with the provisions of the 1962 Constitution, and made the following order:

“We think we should set aside the order of the High Court and remit the proceedings to that Court with a direction that a writ of habeas corpus be issued as prayed. It is accordingly so ordered.”

In as much as the appeal was an appeal against the decision of a full Bench it would seem that the matter should have been remitted to the full Bench. However, on July 15, 1966, the matter again came before Fuad, J., and at some time about 10.30 a.m. the judge, having heard argument by the Deputy Director of Public Prosecutions that the order of the court should now be for the issue of a writ requiring the production before the court of the appellants, made the following order:

“The writ will issue. Let the five applicants be discharged immediately. The order for release will be communicated forthwith by the Registrar to the Minister for Internal Affairs who appears to be the Minister responsible for the administration of the Deportation Act so that the order for release is rendered effective.”

It appears from affidavits filed in these proceedings that the five appellants were, on July 14, 1966, detained at separate places in Uganda, all of which, however, were outside Buganda. On the evening of that day the Inspector-General of Police was informed of the decision of the Court of Appeal and he instructed an Assistant Commissioner of Police to arrange for the appellants to be produced in court on the following morning. For that purpose arrangements were to be made for the collection of the appellants from their places of detention and for them to be transported by aeroplane to Entebbe. We were informed from the Bar that it had been agreed between the advocates for the appellants and the Deputy Director of Public Prosecutions that, having regard to the order of the Court of Appeal, the matter would come before a judge of the High Court on the morning of July 15. It also appears from the affidavits that at 11.30 a.m. on the morning of July 15, 1966, the Minister of Internal Affairs was served with a copy of the order of the High Court and he then instructed his Permanent Secretary to take steps to give effect to the judge's order. The Permanent Secretary then sought to ascertain where each of the five appellants was and he was informed that three of them were in Entebbe, having arrived there by plane shortly before 11.00 a.m. and that the remaining two would be arriving by plane shortly. Unfortunately, due to bad weather the remaining two appellants were detained at Gulu for some appreciable time and did not arrive at Entebbe until 3.00 p.m. on that afternoon. In an affidavit sworn by one of the advocates for the appellants it is stated that the police authorities in Gulu were in constant radio and tele-communication contact with the authorities in Entebbe. At about 3.00 that afternoon, on being informed that all five appellants were at Entebbe Airport, the Permanent Secretary went there, informed the five appellants that their appeal

to this court had been allowed, read to them the terms of the order of Fuad, J., of July 15, 1966, and then informed them that they were free. On leaving the airport building each of the appellants was served with a detention order dated July 15, 1966, made by the Minister of Internal Affairs under the provisions of the Emergency Powers (Detention) Regulations, 1966. These Regulations applied only within Buganda. Following their arrest each of the appellants was conveyed that same day to the Central Government Prison at Kotido and they continued to be detained under orders made under those Regulations.

On August 20, 1966, applications in the form of summonses and numbered in the Miscellaneous Criminal Applications were made on behalf of each of the applicants, with the Sovereign State of Uganda as respondent, requiring the parties to attend a judge in chambers on a specified date for an application that summonses be directed to the Minister of Internal Affairs "to show cause why writs of Habeas Corpus should not issue". These applications were supported by affidavits from each of the appellants setting out the various facts and also by an affidavit of one of the advocates for the appellants, claiming that the arrest of the appellants was unlawful and that the Emergency Powers (Detention) Regulations, 1966, were ultra vires the Emergency Powers Act, 1966, and were also ultra vires art. 30 (5) of the Constitution of Uganda. These applications, described as ex parte but addressed to the Attorney-General, apparently came before a judge of the High Court on August 23, 1966, whereupon the judge made an order in the following terms:

"Let summons issue as prayed for 2.9.66."

Summonses were then issued directed to the Attorney-General and dated August 23, 1966, directing the parties to attend before the court on September 2, 1966:

"To show cause why a writ of habeas corpus should not issue directed to the Minister of Internal Affairs of the Uganda Government to have the bodies (of each of the five appellants) before a judge in open court at the Law Courts, Kampala, immediately after the receipt of such writ to undergo and receive all and singular such matters and things as the judge shall then and there consider of concerning them in this behalf."

We are informed by counsel for the appellants at the appeal, that both the summonses of August 20, 1966, and the summonses of August 23, 1966, were taken out under the common law and not under the Criminal Procedure Code and this was not disputed by the Solicitor-General. If they had been taken out under the Code there would have been no right of appeal to this court (see *Shah* (4)). These summonses came before Keatinge, J., on a number of occasions and a number of orders were made. On September 21, 1966, he described the applications as in the nature of habeas corpus and he held that the Government had not acted in bad faith in bringing the appellants to Entebbe and not releasing them until 3.00 p.m. on July 15, 1966, when they had all arrived at Entebbe. He also held that it was irrelevant whether the appellants had been illegally arrested and brought into Buganda. From this order the appellants appealed on the ground that the judge erred in refusing to issue writs of habeas corpus. In fact it was not the order of September 21, 1966, which refused the application but an order dated September, 28, 1966, when the application was dismissed with costs. It is quite clear that throughout these proceedings and the earlier proceedings there has been considerable confusion and there has been real danger of major issues relating to the liberty of the individual being bogged down in procedural uncertainty.

The memorandum of appeal contained four grounds of appeal, but in essence two issues were argued on the appeal: first, that the judge of the High Court erred in not holding that the five appellants were brought to Entebbe Airport in bad

faith by the Government; and, secondly, that in any event it was not open, having regard to the order of Fuad, J., made on July 15, 1966, to the Government of Uganda to bring the appellants from wherever they were outside Buganda against their will into Buganda, and thus bring them into an area in which the Defence Regulations applied, but that they should have been released wherever they were immediately. It was also urged by the Solicitor-General, who appeared on behalf of the Sovereign State of Uganda, that the procedure adopted was incorrect and that in any event this court should set out in its judgment the proper procedure in relation to the issue and return of a writ of habeas corpus.

During the arguments we invited both counsel to address us on the question of the jurisdiction of this court to hear this appeal. Neither of them did so, both stating that they were satisfied that this court has jurisdiction. Normally it would be the duty of this court to satisfy itself that it has jurisdiction to hear an appeal, but as this appeal relates to the liberty of citizens of Uganda who claim that they have been unlawfully detained by the Executive Government and as the advocates appearing have accepted that this court has jurisdiction, we will assume that we have jurisdiction, though it would have been more satisfactory if the jurisdiction were clearer.

Before we turn to the two main issues raised on this appeal it would be desirable to consider the nature of the writ of habeas corpus ad subjiciendum and the procedure whereby it may be obtained. This is necessary not only because the procedure adopted in this series of cases had an effect upon the substantive issues which were argued, not only because the Solicitor-General asked that this court should give a decision clarifying the procedure, but also because it is of paramount importance to all persons in Uganda that the procedure whereby they may obtain at a moment's notice a remedy which will protect them against any high-handed executive action should be clear beyond question. Counsel for the appellants stated that the application for the writ was made under common law. The summonses would seem to confirm this, but both in this appeal and in the previous one the position has not been completely free from doubt, as under the Criminal Procedure Code, s. 349, the High Court may issue directions in the nature of the writ of habeas corpus and there have been references to that section. However, as has already been stated, it is agreed that action was not taken under that section, therefore we have confined our consideration to the procedure under the common law on an application for a writ of habeas corpus.

The writ of habeas corpus ad subjiciendum is a prerogative writ issued by reason of a common law right, and the effectiveness of the writ has been made more complete by the successive Habeas Corpus Acts of the United Kingdom. These Acts are Acts of general application. By reason of s. 2 of the Judicature Act (Cap. 34) the High Court of Uganda has jurisdiction to issue this writ in conformity with the common law and statutes of general application in force in England on August 11, 1902, subject of course, to such qualifications as the circumstances of Uganda may render necessary. Thus recent cases in the United Kingdom which are determined under a procedure introduced in 1938 are of little importance in Uganda as neither the procedure adopted in 1938 under O. 59, nor indeed the Crown Office Rules, 1906, are applicable in Uganda. In the United Kingdom it is assumed that a writ is issued under the common law unless the fact that it is issued under one of the statutes is endorsed thereon. We do not think it necessary that the circumstances of Uganda require that any distinction be drawn between writs issued under the common law or those issued under any of the Habeas Corpus Acts and we consider that the procedure and the nature of the writ should be the same whether the writ is applied for under common law or one of those Acts. The writ of habeas corpus is a writ of right granted *ex debito justitiae*, but it is not a writ of course and it may be refused if the circumstances are such that the writ should not issue. The purpose of the writ is to require the

production before the court of a person who claims that he is unlawfully detained so as to test the validity of the detention and so as to ensure his release from unlawful restraint should the court hold that he is unlawfully restrained. It is a writ which is open not only to citizens of Uganda but also to others within Uganda and under the protection of the State. The object of the writ is not to punish but to ensure release from unlawful detention; therefore it is not available after the person has in fact been released. The writ is directed to one or more persons who are alleged to be responsible for the unlawful detention and it is a means whereby the most humble citizen in Uganda may test the action of the executive government no matter how high the position of the person who ordered the detention. If the writ is not obeyed then it is enforced by the attachment for contempt of all persons who are responsible for the disobedience of the writ.

The procedure for the application for the writ and the proceedings subsequent thereon as it existed in England at the beginning of this century and as such procedure is suitable to the conditions of Uganda is as follows: The application should be made by motion to the court, which motion must be supported by affidavits setting out the facts, one of which affidavits should be by the person on whose behalf the application is made. If, however, that person is unable, due to the circumstances of his detention, to make such affidavit, then someone else can make it on his behalf and it should be so stated in the affidavit. The motion should be made *ex parte* in the first instance and the court hearing the motion if it does not refuse the writ, would normally make an order *nisi*, which would be served on the person to whom the writ if issued would be directed, calling upon him to show cause why the order should not be made absolute and the writ issued. The date upon which that person is called upon to show cause would be specified in the order *nisi*. If at the hearing of the *ex parte* application the court considered that the circumstances of the case required the order to be made absolute immediately, then it would make such order and the writ would issue immediately. The object of normally making an order *nisi* on an *ex parte* application would be to avoid the inconvenience and expense of bringing the person detained before the court. If the court is not sitting and the application is of extreme urgency it may be made verbally to a judge wherever he may be but the application must be supported by an affidavit setting out the facts. The judge may either order the immediate issue of the writ or he may make an order *nisi*. If the court or a judge makes an order *nisi* then the validity or otherwise of the detention would be tested on the hearing to make the order absolute, and if the order is made absolute and the writ issued, then on the return of the writ no further argument, unless something new has arisen, would take place. If the order is made absolute in the first place and the writ issued, then on the return of the writ the validity of the detention would then be examined. In either case on the writ being issued the person to whom it is directed would be required to make a return setting out in detail the circumstances and authority under which the person detained is so detained, and that person must be produced before the court on the return of the writ. It is true that in England under the procedure introduced in 1938 the court may order that the person detained be released immediately without his production before the court, but this procedure does not apply in Uganda nor did it apply in England at the beginning of the century. There are many obvious reasons why the old English common law procedure which required the body of the person detained to be produced to the court should continue to be the proper procedure in Uganda. We consider that the action of Fuad, J., following the previous decision of this court, in ordering the immediate release of the appellants without requiring them to be produced before the court was erroneous, even if the matter fell within his jurisdiction and not within the jurisdiction of the constitutional court of three judges which had ordered that the writ should not be issued and from which the appeal to this court

had been brought. Finally, the application for the writ and the subsequent proceedings would normally be civil proceedings; indeed they would only be criminal proceedings if, should the applicant not be released, the immediate result would be either his trial on a criminal charge or his return to prison to serve a sentence of imprisonment. The proceedings in this appeal, though treated as criminal proceedings, should have been civil proceedings.

The first main issue argued was that the Government of Uganda had acted in bad faith in bringing the appellants to Entebbe before releasing them. The facts upon which the judge was asked to infer bad faith were first, that the appellants had been detained outside Buganda and could not have been arrested under the Defence Regulations unless they were brought within Buganda and, secondly, that Fuad, J., had in the morning ordered their immediate release, an order which had not been complied with by the authorities until all the appellants were assembled at Entebbe. Keatinge, J., rejected any question of bad faith and held that the actions of the authorities were, in the circumstances, reasonable and were not such as to lead him to draw the inference of bad faith. As the question of bad faith depends upon an inference drawn from facts, then this court is in as good a position as the High Court to draw or not to draw the inference of bad faith. We see absolutely no reason to differ from the finding of Keatinge, J., on this matter. As we have said, the order of Fuad, J., directing the immediate release of the appellants was, we consider, wrong. It was proper that Government should take all necessary action to produce the bodies of the person detained before the court in anticipation of what should have been the order of the High Court, and we do not consider that any question of bad faith would have arisen had it not been that the aeroplane carrying two of the appellants had been delayed at Gulu by bad weather. It is true that it would be possible to draw from the facts an inference of bad faith, but if it is desired to ask a court to draw an inference of that nature, then the persons, for example, the Permanent Secretary to the Minister of Internal Affairs, who swore affidavits giving the reasons for the action taken by the authorities, should have been served with notice requiring their attendance for cross-examination so that the allegations of bad faith could have been put to them and their answers made. It is not proper that allegations of bad faith on the part of persons who have sworn affidavits should be made without any attempt whatsoever to cross-examine them on those imputations.

The second main issue argued was, irrespective of any question of bad faith in bringing the appellants to Entebbe before releasing them, whether, as the appellants had been illegally detained, it was open to the minister to confer on himself a power to act under the Defence Regulations when that power arose from the act of bringing the appellants against their will within the area to which the Defence Regulations applied. It is possible that on an examination of the facts this argument would not apply to all five of the appellants. We will, however, for the purposes of this appeal, assume that the facts in relation to all five are exactly the same. It is clear from a number of cases (see for example, *Emperor v. Savarkar* (1), *Ex Parte Lannoy* (2), *R. v. Larssonneur* (3)) that a court has jurisdiction to deal with a person before it no matter how improper the procedure which brought that person before the court. Counsel for the appellant, however, submitted that while that might be the position in relation to the judicial acts of a court it could not and should not be the position in relation to an act of an administrative character done by a minister. He urged that it would be quite wrong to say that a minister had validly exercised a power of detention over a citizen of Uganda if that power of detention had come into existence by reason of an unlawful act of the minister. Could it, be instanced, be the position that if a minister had legislative power to detain a person only if he were within Buganda he could validly exercise that power by kidnapping a person outside

Buganda, unlawfully bring him into Buganda, and then purport validly to detain him? Counsel for the appellants urged that this is precisely what happened in this case. We consider that as an abstract proposition of law there is considerable force in his submission, but we do not consider that the facts of this case fall within that abstract proposition. We leave for consideration, in the unfortunate event of it being necessary in the future, the question whether a minister can, acting in bad faith, unlawfully arrest a person outside an area in which he has a power of detention, bring that person within that area, and then purport validly to exercise his power of detention. We would assume and trust that such action would not be taken by any minister of Uganda. In this case, as we have already held, the action was taken in good faith by the minister. We consider that the minister properly made arrangements for the five appellants to be brought within Buganda so that they could be produced in person to the court; and we do not consider that in the particular circumstances the delay in complying with the order of Fuad, J., affected the position. It is true that having regard to the previous decision of this court the detention of the appellants under the Deportation Act was an unlawful detention, but that unlawful detention was not initiated in order to create a right to detain. The appellants were already in detention when arrangements were made for them to be brought within Buganda and those arrangements were made not with the object of creating a right of further detention but with the object of complying with what was properly assumed would be an order of the court. As a result the appellants were fortuitously within an area which enabled the minister to issue the detention orders under the Defence Regulations after their release from their former detention, but, for the reasons we have set out, they were not unlawfully brought within that area with the object of creating the power which was subsequently exercised.

For these reasons we consider that the decision of Keatinge, J., was correct and we dismiss this appeal. We make no order for costs as we had no application therefore nor argument thereon.

Appeal dismissed.

For the appellant:

Abu Mayanja & Co., Kampala

P. J. Wilkinson, Q.C., A. K. Mayanja and J. W. R. Kazzora

For the respondent:

The Attorney-General, Uganda

Nkambo Mugerwa and A. J. S. Tibamanya (both State Attorney, Uganda)

Josephat M Mutungi v Ndungu Kabuchi and another
[1966] 1 EA 454 (HCK)

Division: High Court of Kenya at Nairobi

Date of judgment: 2 November 1966

Case Number: 517/1965

Before: Dalton J

Sourced by: LawAfrica

[1] Practice – Cause or action – Separate suits in respect of same wrongful act – Damage to property and injury to person as a result of motor accident – Judgment recovered for damages for personal injuries – Damages in respect of damage to vehicle could have been recovered in the same action – Maxim “Interest reipublicae ut sit finis litium” – Whether second action contrary to law and not maintainable.

[2] Costs – Separate suits in respect of same wrongful act – Damage to property and injury to person – Judgment recovered for damages for personal injuries – Damages in respect of damage to vehicle could have been recovered in the same action – Plaintiff not entitled to costs of the second action – Civil Procedure (Revised) Rules, 1948, O. 2, r. 1 (2).

Editor’s Summary

The plaintiff was involved in a motor accident, with the vehicle owned by the second defendant and driven by the first defendant, in which he suffered personal injuries and his motor vehicle was damaged. Two separate actions were filed on the same day against the defendants, in the first a consent judgment was entered for the claim for personal injuries. The second suit for the damage to the vehicle was defended. The plaintiff could have recovered damages in respect of the damage to the vehicle in the first action. On the hearing of the second action a preliminary objection was taken on behalf of the defendants that the suit was contrary to law because it contravened the maxim “Interest reipublicae ut sit finis litium” and the suit was therefore barred.

Held –

- (i) the plaintiff had two distinct and separate causes of action, one for personal injuries suffered and the second for the damage to the vehicle and the plaintiff was not barred from bringing two suits against the defendants. *Brunsdon v. Humphrey* (1884), 14 Q.B.D. 141 applied;
- (ii) all the injuries suffered by the plaintiff were patent when the two actions were filed and as it is the normal practice to include in one suit, the claim for injury to property and injury to person, the plaintiff should not be awarded costs of the second action.

Preliminary objection overruled.

[**Editorial Note:** the question whether the court had any jurisdiction in the second suit after a decision in the first suit was not considered from the point of view of res judicata – Civil Procedure Act, s. 7, Explanation 4.]

Cases referred to in judgment:

- (1) *Brunsdon v. Humphrey* (1884), 14 Q.B.D. 141.
- (2) *Payana Reena Saminathan v. Pana Lana Palanippa* (1914), 41 I.A. 142.
- (3) *The Oropesa*, [1943] P. 32.

Judgment

Dalton J: In this case which is numbered Civil Case 517 of 1965 the plaintiff is claiming from the

defendants the sum of Shs. 4,189/-, damages arising out of a motor accident on July 12, 1964, together with interest

thereon and the costs of this suit. The sum claimed in this suit arises from damage to the plaintiff's motor car as a result of the accident; in Civil Case 516 of 1965 the same plaintiff sued the same defendant for damages for the injuries he himself had suffered in the accident and in a consent judgment he was awarded Shs. 3,028/30 as damages for his injuries. When this present case came on for trial it was agreed between the parties that the amount claimed was not in dispute and no evidence was called but counsel for the defendants raised a preliminary objection.

He said that arising out of the accident on July 12 the plaintiff on the same day filed two suits, one claim for damages for personal injuries and one claim for damages to property and he submitted that such proceeding is contrary to law, that it contravenes that admirable rule of law "Interest reipublicae ut sit finis litium" and counsel submitted that this present case is therefore barred. He then immediately faced the case which would appear to be completely against the submission he had just made. It is the case of *Brunsdon v. Humphrey* (1), and it is quoted on p. 592 of Bingham's Motor Claim Cases (5th Edn.), as authority for the following propositions:

"A plaintiff may bring two separate actions in respect of the same circumstances provided there are two causes of action i.e. (1) personal injuries, (2) damage to personal property. Damage to goods and injury to the person give rise to distinct causes of action, although occasioned by the same wrongful act."

In what I shall refer to as *Brunsdon's* case (1), the plaintiff brought an action against the defendant in the county court for damage to his goods (in that case a cab) and recovered the amount he claimed. He later brought an action in the High Court against the same defendant in respect of the same act of negligence, for personal injuries. "Held the action was maintainable and was not barred by the previous proceedings in the county court. The test is not whether he had the opportunity of recovering in the first action what he claims in the second, but whether he sought to do so."

The headnote in *Brunsdon's* case (1) as reported in the Queen's Bench Division is as follows:

"Damage to goods and injury to the person, although they have been occasioned by one and the same wrongful act, are infringements of different rights, and give rise to distinct causes of action; and therefore the recovery in an action of compensation for the damage to the goods is no bar to an action subsequently commenced for the injury to the person."

So held by Brett, M.R., and Bowen, L.J.; Lord Coleridge, C.J., dissenting. The plaintiff brought an action in a county court for damage to his cab occasioned by the negligence of the defendant's servants, and, having recovered the amount claimed, afterwards brought an action in the High Court of Justice against the defendant, claiming damages for personal injury sustained by the plaintiff through the same negligence: Held, by Brett, M.R., and Bowen, L.J., Lord Coleridge, C.J., dissenting, that the action in the High Court was maintainable, and was not barred by the previous proceedings in the county court.

Counsel for the defendants urged that it was extremely important that the particular facts in *Brunsdon's* case (1) should be kept constantly in mind and compared with the facts in this case. In *Brunsdon's* case (1) it was alleged by the plaintiff that he had been ignorant at the time he brought his action for damage to his cab, of the importance and extent of the personal injuries he has received in the accident. Counsel for the defendants said that the vital difference is that in this present case the plaintiff knew what damage he had suffered at the

time of filing both suits. In his judgment in *Brunsdon's* case (1), Brett, M.R., said ((1884), 14 Q.B.D. at p. 145):

“‘For the defendant, reliance has in effect been placed upon the maxim, *Interest reipublicae ut sit finis litium*; and it has been contended that it enunciates an admirable rule of law. When, that rule is applied to damages which are patent, it is a good rule; but where damages are afterwards developed it is not a rule to be commended.’ As the injuries were patent in this case, this dictum appears to support Mr. Shaylor’s submission. Brett, M.R., continued: ‘The plaintiff has brought the present action on the ground that he has been injured in his person. He has the right to be unmolested in all his bodily powers. The collision with the defendant’s van did not give rise to only one cause of action: the plaintiff sustained bodily injuries, he was injured in a distinct right and he became entitled to sue for a cause of action distinct from the cause of action in respect of the damage to his goods: therefore the plaintiff is at liberty to maintain the present action’. Brett, M.R., concluded his judgment by saying – ‘Two actions may be brought in respect of the same facts, where those facts give rise to two distinct causes of action’.”

In his judgment, Bowen, L.J., said (*ibid.*, at p. 150):

In his dissenting judgment Lord Coleridge, C.J., after expressing his regret that he was unable to concur in the other two judgments said (*ibid.*, at p. 152):

“I should have been glad in the face of this difference of opinion to have given reasons at length for my inability to agree in the judgment. But the plaintiff very naturally presses for judgment and I am unable to do more than shortly to express my dissent. It appears to me that whether the negligence of the servant, or the impact of the vehicle which the servant drove, be the technical cause of the action, equally the cause is one and the same: that the injury done to the plaintiff is injury done to him at one and the same moment by one and the same act in respect of different rights, i.e. his person and his goods, I do not in the least deny; but it seems to me a subtlety not warranted by law to hold that a man cannot bring two actions, if he is injured in his arm and in his leg, but can bring two, if besides his arm and his leg being injured his trousers which contain his leg, and his coat sleeve which contains his arm, have been torn. The consequence of holding this

are so serious, and may be very probably so oppressive, that I at least must respectfully dissent from a judgment which establishes it.”

Whilst counsel for the defendants urged me not to follow *Brunsdens*’ case (1), counsel for the plaintiff relied strongly on it and argued that it was clear authority for the proposition that if a person receives injuries in an accident and his car is also damaged in such accident, there are two distinct causes of action arising out of trespass to person and trespass to property; he also argued that there is no prohibition in the rules to the filing of two causes of action. Counsel for plaintiff referred to various Indian text books and cases but I think I need only refer to the case of *Payana Reena Saminathan v. Pana Lana Palanippa* (2). This case raised a question as to the effect of s. 34 of the Ceylon Civil Procedure Code, 1889, which is in the same terms as the Indian Code of Civil Procedure, 1908, O. 2, r. 2, from which having regard to its terms I have no doubt our O. 2, r. 1, is derived. In that case in which there were two actions the Judicial Committee held that although the claims in the two actions arose out of the same transaction, they were in respect of different causes of action and that, consequently, the second action was not brought contrary to s. 34 of the Ceylon Code and could be maintained.

Counsel for the defendants has argued that on the facts of this present case *Brunsdens*’ case (1) does not apply, that in any event this court is not bound by such decision and it is a case in which Bowen, L.J., gave a very hesitant judgment. I do not think that it was a hesitant judgment, it certainly was not so described in a very much more recent case to which I will refer; Bowen, L.J., no doubt had great hesitation in differing from the court below and the Chief Justice but it seems to me to be a firm and decisive judgment based on reasons fully discussed in the judgment. On the other hand Lord Coleridge’s very short dissenting judgment gives few reasons for his dissent and with respect I do not agree with the reasons such as they are. I do not think that the Master of the Rolls’ dictum which appears to support counsel for the defendants is authority for the proposition that if all the injuries are patent when legal action is taken then damages for such injuries can be sued for only in one action. However if it was considered that there was no good reason for bringing two suits a court would no doubt bear in mind the following observations of Bowen, L.J., in his judgment ((1884). 14 Q.B.D. at p. 151):

“It may be said that it would be convenient to force persons to sue for all their grievances at once and not to split their demands; but there is no positive law (except so far as the County Court Acts have from a very early date dealt with the matter) against splitting demands which are essentially separable (see *Seddon v. Tutop*), although the High Court has inherent power to prevent vexation or oppression, and by staying proceedings or by apportioning the costs, would have always ample means of preventing any injustice arising out of the reckless use of legal procedure.”

The more recent case to which I have referred is that of the *Oropesa* (3). In his judgment with which the other members of the Court of Appeal concurred, Lord Wright said ([1943] P. at p. 35):

“It has been argued as regards the claim for loss of expectation of life (which is a claim on behalf of the estate of the deceased man) that there is an estoppel because in the collision action brought by the owners of the Manchester Regiment, the plaintiffs, as personal representatives of the deceased, were joined as plaintiffs and sued for the lost effects of the deceased – a course which in practice is always adopted. The answer to the argument which has been advanced is clear. Whether or not it is logical, this is an exception to the rule that there cannot be two actions in respect of the same

casualty. The reason is that, although the claim is in respect of the same negligence, the damages claimed are in respect of the infringement of different rights. That being so, the fact that the plaintiffs brought an action in which they recovered damages for injury to the one right, namely, the injury to chattels, does not prevent them bringing an action for an injury to an entirely different right, that is to say, an injury to the person, including loss of life. This was established by the judgment of the majority of the Court of Appeal in *Brunsdon v. Humphrey* (1884), 14 Q.B.D. 141, and I may refer particularly to the illuminating judgment of Bowen, L.J., in that case. That issue, therefore, may be disregarded.”

Therefore on the two authorities I have quoted, and I see no good reason to differ from what has been clearly set out by eminent judges in England, it seems plain to me that the plaintiff has two separate causes of action and that counsel for the defendants’ preliminary objection, which is the defence pleaded in this action, must fail. Since there is no dispute between the parties as to the damages claimed, the plaintiff will therefore be awarded the sum of Shs. 4,189/-.

As to costs counsel for the defendant urged that to safeguard parties from multiplicity of suits this court should award no costs to the plaintiff. For his part counsel for the plaintiff said that the reasons why two actions were filed emerge from his letter to the defendants’ advocates dated January 27, 1966. Counsel for the plaintiff also said that if he had filed one action it would have been an injustice to his client and so it was incumbent on him to file both. I can understand why the plaintiff obtained his costs in *Brunsdon’s* case (1) having already obtained his costs in the County Court, since he was suing in respect of injuries which were not patent when he took his action in the County Court for damage to his cab. In this present matter all the injuries were patent when the two actions were filed on the same day. It is my understanding and experience that in cases of this nature when injury to property and injury to person arise out of an accident claims for damages for each type of injury are included in one suit and I have never heard it argued that such a course results in injustice to the claimant. With respect to counsel for the plaintiff, I do not think that the reasons set out in his letter of January 26 show that the action taken here was necessary to avoid an injustice to his client; at the highest I think it could only be said that it was a convenient way of proceeding. Even if it was convenient it seems to me to infringe the good rule to which Brett, M.R., referred to and I do not propose to award the costs of this action to the plaintiff.

I will now hear argument concerning item (b) of para. 7 of the plaint.

Preliminary objection overruled.

For the plaintiff:

J. K. Winayak & Co., Nairobi

J. K. Winayak

For the defendant:

Kaplan & Stratton, Nairobi

B. Shaylor

Adamu Mwambalafu v Republic
[1966] 1 EA 459 (CAD)

Division:

Court of Appeal at Dar-es-Salaam

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Date of judgment: 19 October 1966
Case Number: 169/1966
Before: Sir Charles Newbold P, Duffus Ag VP and Law JA
Sourced by: LawAfrica
Appeal from: The High Court of Tanzania, BIRON, J.

[1] Criminal law – Charge – Duplicity – Arson – Attempted murder – Count alleging burning of two houses situated apart – Count alleging attempted murder of two persons – Whether defect curable under Criminal Procedure Code, s. 346 (U.).

[2] Criminal law – Practice – Alternative counts – First count of arson and second of attempted murder – Accused convicted and sentenced on both counts – Appeal – Usual practice is to convict on one and to make no finding on the other.

Editor's Summary

The appellant was charged on alternative counts with arson and attempted murder contrary to s. 319 and s. 211 of the Penal Code. The particulars of the charge of arson stated that the appellant set fire to two houses, one of K. and the other of N. The house of N. was more than hundred yards from K.'s house. The particulars of the charge of attempted murder stated that the appellant attempted to cause the death of K. and his wife by setting on fire two houses, one of K. and the other of N. After the assessors had given their opinions and before judgment was delivered the trial judge noticed that both the counts were bad for duplicity, but considered that it was too late for the irregularities to be corrected by amendment. The judge purported to invoke s. 346 of the Criminal Procedure Code in relation to the first count of arson and held that the first count although bad for duplicity, had occasioned no failure of justice. As regards the duplicity in the second count, in referring to the setting on fire of more than one house, the judge disregarded the reference to the burning of N.'s house. The appellant was convicted of both counts, notwithstanding that the two counts were stated in the information to be in the alternative, and was sentenced to concurrent terms of three and six years' imprisonment. On appeal,

Held –

- (i) the judge erred in invoking s. 346 of the Criminal Procedure Code, whose provisions can only be used by the court sitting "on appeal or revision";
- (ii) the appellant could and should have been charged with two offences arising out of the two acts of arson, but the charging of these two offences as one had not occasioned a failure of justice; the irregularity was curable by the court under s. 346 of the Criminal Procedure Code;
- (iii) the alleged attempted murder on two occasions of K. and his wife. first by burning K.'s house and then by burning N.'s house when K. and his wife took refuge there after K.'s house had been destroyed, should have been the subject of two separate counts, and each count should have charged the attempted murder of either K. or his wife and not both together.
- (iv) the duplicity in the second count and the judge's disregarding of the reference to the burning of N.'s house were irregularities curable under s. 346;

- (v) the proper course where there are alternative counts is to convict and sentence on one and to make no finding on the other;
- (vi) the charges of arson and attempted murder were not cognate offences such as could properly be charged in the alternative but if the Director of

- Public Prosecutions chose to make charges in the alternative, the trial must proceed on that basis;
- (vii) the conviction on the first alternative count precluded the court from convicting on the second count, because the appellant had in effect only been charged with the commission of one offence.

Appeal allowed in part. Conviction and sentence on the second count of attempted murder quashed and set aside.

Cases referred to in judgment:

- (1) *R. v. Nassa Ginnars Ltd.* (1955), 22 E.A.C.A. 434.
- (2) *Wachira Njenga v. R.* (1954), 21 E.A.C.A. 398.
- (3) *R. v. Seymour*, [1954] 1 All E.R. 1006.

Judgment

Law JA, read the following judgment of the court:

The appellant was charged in the High Court of Tanzania sitting at Mbeya with the following two offences:

“First count – Statement of Offence

Arson, contrary to s. 319 (a) of the Penal Code.

Particulars of Offence

Adamu Mwambalafu on or about November 2, 1964, at Rulasimba Village, Mbeya District, did wilfully and unlawfully set fire to two houses of Kassim Kilamula and one house of Nyambalafu Mwaluhonga.

Second Count (alternative to count 1)

Attempted murder, contrary to s. 211 (1) of the Penal Code.

Particulars of Offence

Adamu Mwanbalafu on or about November 2, 1964, at Rulasimba Village, Mbeya District, did unlawfully attempt to cause the death of Kassim Kilamula and his wife Lilamumesa Malipula by setting on fire two house of Kassim Kilamula and one house of Nyambalafu Mwaluhonga.”

Clearly both counts are, on the face of them, bad for duplicity. So far as arson is concerned, the burning of the two houses of Kassim Kilamula might have formed the subject of one count, if the same act of arson caused both houses to ignite, but the house of Nyambalafu was more than one hundred yards from Kassim’s houses, and caught fire as the result of a separate act of arson, and should therefore have been the subject of a separate count. Similarly, the alleged attempted murder on two occasions of Kassim and his wife, Lilamumesa, first by burning Kassim’s houses, and then by burning Nyambalafu’s house when Kassim and his wife took refuge there after Kassim’s house had been destroyed, should have been the subject of two separate counts, and each count should have charged the attempted murder of either Kassim or his wife and not both together.

These defects in the information were not noticed by the learned trial judge, or by the State Attorney (the appellant was unrepresented) until after the assessors had given their opinions and before judgment was delivered, a stage which the judge considered too late for the irregularities to be corrected by

amendment.

What he did in relation to the first count was to invoke the provisions of s. 346 of the Criminal Procedure Code, which provides that:

“... no finding, sentence or order pass by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of any error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code (or) unless such error, omission or irregularity has in fact occasioned a failure of justice.”

The word “(or)” which we have placed in brackets in the above extract from s. 346 appears in the text but clearly should not be there.

We are of opinion that the judge erred in invoking s. 346, whose provisions can only be used by a court sitting “on appeal or revision”, and not by a court of first instance. However, we agree with his conclusion that the first count, although bad for duplicity, had occasioned no failure of justice. The appellant could and should have been charged with two offences arising out of the two acts of arson, and the charging of these two offences as one, in a single count, was not prejudicial and has certainly not occasioned a failure of justice, and is an irregularity curable by this court under s. 346.

As regards the duplicity in the second count, in referring to the setting on fire of more than one house, the judge disregarded the references to the burning of Nyambalafu’s house, treating them as mere surplusage. In effect, having decided that it was too late to correct the defective charge by amendment, by deleting the reference to the burning of Nyambalafu’s house, the judge sought to achieve the same object by disregarding those reference; This might be described as a distinction without a difference; a mental amendment instead of a formal one. This course was, in our opinion, irregular, but again we are satisfied that it occasioned no prejudice or failure of justice and is curable under s. 346. The same applies to the charging of the attempted murder of two persons in one count.

On the evidence, the judge was completely satisfied that the appellant set fire to Kassim’s houses and to Nyambalafu’s house, and that when he burnt Kassim’s main house he did so with the intention of killing the occupants, as he first secured the door from outside so as to prevent their escape from the burning house. The memorandum of appeal is directed solely against these findings, which are fully supported by the evidence, and we are satisfied that there are no merits in the appeal on the facts.

There is, however, a further important point of law which, although not made a ground of appeal, arises on the face of the record and must be dealt with.

The two counts were stated in the information to be in the alternative. Notwithstanding this, the learned judge convicted the appellant on both counts, and sentenced him to concurrent terms of three and six years’ imprisonment. The usual practice, in the case of alternative counts, is to convict on one and to make no finding on the other. In *R. v. Nassa Ginnars Ltd.* (1), the respondent company had been prosecuted on two alternative counts in a subordinate court. In delivering the judgment of the court, Briggs, J.A., said ((1955), 22 E.A.C.A. at p. 436):

“These counts were properly treated as alternative. The learned magistrate convicted on the first and sentenced the company to fine of Shs. 1,000/-. He acquitted on the second. A more proper course would have been to make no finding on it.”

Again, in *Wachira Njenga v. R.* (2), it was held in the majority judgment of the court that:

“The recent English case of *R. v. Seymour* (3) pointed out that where there are alternative counts and the conviction is recorded on one, the jury should not give a verdict on the other. Similarly, we are persuaded that it is the correct practice for judges to follow in these territories, for it leaves open, where the alternative count charges a cognate and minor offence, for a Court of Appeal to substitute a verdict of guilty of that offence, a course which the court could not adopt if a verdict of an acquittal had been recorded on the alternative count.”

We have no doubt that the proper course, in a case where the accused had been proved to be guilty on each of two counts stated to be alternative is to convict and sentence on one and to make no finding on the other.

We are of opinion that the charges of arson and attempted murder in the case now under consideration were not cognate offences such as could properly be charged in the alternative, but were charges alleging two separate and distinct offences. Nevertheless, the Director of Public Prosecutions has the control of criminal proceedings, and if he chooses to charge two counts in the alternative, the trial must proceed on that basis. The Director is alleging, in such a case, that the accused is guilty of either the offence charged in count I or the offence charged in count II, and in such circumstances it is our opinion that, if the court decides to convict on one count, and does convict, it is precluded from convicting on the other count, for the simple reason that the Director has, in effect, only charged the omission of one offence.

It follows that in our view the conviction on the alternative second count, charging attempted murder, cannot stand. With considerable reluctance, we quash the conviction on the second count and set aside the sentence of six years' imprisonment. The appeal succeeds to this limited extent.

Appeal allowed in part. Conviction and sentence on the second count of attempted murder quashed and set aside.

The appellant did not appear and was not represented.

For the respondent:

The Attorney-General, Tanzania

R. H. Kisanga (State Attorney, Tanzania)

George Kigoya v Attorney-General of Uganda [1966] 1 EA 463 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	25 October 1966
Case Number:	70/1966
Before:	Sir Udo Udoma CJ
Sourced by:	LawAfrica

[1] *Practice – Application for judgment in default of appearance – Application by way of notice of*

motion – Suit against Attorney-General of Uganda – No prior leave of court obtained to enter judgment – Whether application properly before court – Civil Procedure (Government Proceedings) Rules, 1959, r. 6 (U.).

[2] Practice – Extension of time within which to enter appearance – Application by way of chamber summons – Application required to be made by notice of motion – Inherent jurisdiction – Whether discretion can be exercised to grant the application – Civil Procedure Rules, O. 47, r. 6 and O. 48, r. 1 (U.) – Civil Procedure Act, s. 101 (U.).

Editor's Summary

The plaintiff had filed an action for damages for assault, false imprisonment and malicious prosecution against the Attorney-General of Uganda and on January 29, 1966, a summons in terms of O. 9, r. 1 of the Civil Procedure Rules to enter appearance within thirty days was issued. No such appearance had been entered and on July 25, 1966 the plaintiff filed an application by notice of motion for judgment against the defendant in default of the entry of appearance. At the hearing the defendant raised a preliminary objection that under the provisions of r. 6 of the Civil Procedure (Government Proceedings) Rules, 1959, the application for judgment was misconceived as no prior leave of the court had been obtained. Counsel for the plaintiff argued that since the application had been brought under r. 6 *ibid.*, it was competent for the court to enter judgment or alternatively, to treat the application as one for leave to do so. In the meantime, the defendant filed an application by way of chamber summons for extension of time within which to enter appearance and file a defence, but at the hearing counsel for the plaintiff raised a preliminary objection and applied for the application to be struck off as it was not properly before the court since by reason of O. 48, r. 1 it had not been made by notice of motion. On the other hand state counsel argued that the court should exercise its discretion under O. 48, r. 8 or under s. 101 of the Civil Procedure Act.

Held –

- (i) the plaintiff's application for judgment was premature and misconceived, and was also not properly before the court for want of compliance with r. 6 of the Civil Procedure (Government Proceedings) Rules, 1959, since the application was brought by motion instead of by summons;
- (ii) the defendant's application for extension of time having been brought by summons in chambers had contravened the provisions of O. 48, r. 1 and therefore was not properly before the court;
- (iii) this was not a proper occasion for the court to resort to its inherent jurisdiction or discretion or any discretion vested in it under s. 101 of the Civil Procedure Act or under O. 48, r. 8; since the application was not properly before the court and no application for amending it had been made, there was nothing upon which the court could base the exercise of its discretion.

Preliminary objection upheld in each case. Both applications dismissed.

Judgment

Sir Udo Udoma CJ: This suit has been instituted by one George Kigoya (hereinafter referred to as plaintiff) against the Attorney-General of Uganda (hereinafter referred to as defendant) for damages for assault, false imprisonment and malicious prosecution. The plaint was filed on January 28, 1966 and on January 29, 1966, a summons in terms of O. 9, r. 1 of the Civil Procedure Rules to enter appearance within thirty days of the service of the summons on the defendant was issued. It was served on the defendant on February 10, 1966. No such appearance has been entered.

On July 25, 1966, the plaintiff filed an application by motion for the court to enter judgment against the defendant in default of the entry of appearance. The motion was fixed for hearing on October 12, 1966.

In the meantime the defendant on October 11, 1966 filed an application by chambers summons for extension of time within which to enter appearance and file defence. The summons was fixed for hearing in chambers on October 12, 1966.

[The judge stated that both applications were taken together by consent of counsel, on October 12, 1966, the chambers summons for extension of time being taken first and continued:] At the hearing counsel for the plaintiff raised a preliminary objection in point of law. He applied that the application for extension of time be struck off as it was not properly before the court for non-compliance with O. 48, r. 1 of the Rules of this Court.

Counsel for the defendant, while conceding that the application had not complied with the provisions of O. 48, r. 1 of the Rules and that it was in fact brought under O. 47, r. 6 of the Rules, applied that the court should nevertheless exercise its inherent jurisdiction in favour of the defendant under O. 48, r. 8 of the Rules and s. 101 of the Civil Procedure Act.

Order 47, r. 6 under which, as agreed by both counsel, the application for extension of time was brought reads as follows:

“Where a limited time has been fixed for doing any act or taking any proceeding under these Rules or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed;

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court shall otherwise order.”

The application for extension of time as brought under the Rule as set out above, might probably have found favour with the court in the exercise of its discretion, but counsel for the plaintiff has objected to the exercise of any such discretion, but counsel for the plaintiff has objected to the exercise of any such discretion on the ground that the application has failed to comply with O. 48, r. 1 of the Rules of this Court, the provisions of which are in the following terms:

“All applications to the court, save where otherwise expressly provided for in these Rules, shall be by motion and shall be heard in open court.”

The contention of counsel for the plaintiff is that since there is no provision in O. 47, r. 6 of the Rules of this Court stipulating that an application for extension of time brought under it should be by summons in chambers, this application by the defendant having been brought by summons in chambers, has

contravened the provisions of O. 48, r. 1 of the Rules and therefore not properly before the court.

I think this objection is well taken. As I had pointed out to counsel at the hearing of the application, I accept the submission that the application for

extension of time brought, as has been admitted by both counsel, under O. 47 r. 6 of the Rules of this Court, is not properly before the court. The defendant has failed to comply with the provisions of O. 48, r. 1 of the Rules of this Court. In terms of the provisions of O. 48, r. 1 the application ought not to have been instituted by chamber summons but by motion to be heard in open court.

Counsel for the defendant's application that the court should exercise its discretion under O. 48, r. 8 of the Rules and s. 101 of the Civil Procedure Act is refused. In my view this is not a proper occasion for this court to resort to its inherent jurisdiction or discretion or any discretion vested in it under s. 101 of the Civil Procedure Act or under O. 48, r. 8 of the Rules of this Court. Since the application is not properly before the court and no application for amending it has been made, there is nothing upon which this court can base the exercise of its discretion, which discretion, in any event, must be judicially exercised.

The objection raised is a fundamental one. It is in substance that the defendant has failed to comply with the Rules of the Court designed to facilitate the work of the court by instituting this application under an irregular procedure specifically excluded by the Rules of the Court. It is the duty of every counsel to comply with the Rules of this Court.

As already pronounced, I rule that this application for extension of time is not properly before this court for non-compliance with O. 48, r. 1 of the Rules. It is refused. Costs of this application to the plaintiff.

I now turn to consider the second application, which is by motion by the plaintiff for judgment to be entered against the defendant on the ground that the defendant has failed to enter appearance after the service of summons on him and to file his defence to the suit.

Counsel for the defendant has also raised a preliminary objection on the ground of law. He has submitted that by reason of the provisions of r. 6 of the Civil Procedure (Government Proceedings) Rules, 1959, the application for judgment in default of the entry of appearance and defence is misconceived as no prior leave of this court has been obtained. He contended further that the court has no jurisdiction to grant the application without the leave of this court first obtained, and therefore that the application be dismissed.

Counsel for the plaintiff contended that since the application has been brought under r. 6 of the Civil Procedure (Government Proceedings) Rules, it was competent for the court to enter judgment for the plaintiff or in the alternative, to treat the application as one for leave. In such event, the court could competently grant leave to the plaintiff to enter judgment against the defendant since there has been default both in entering appearance and in filing defence.

This application is by motion and it is so headed. It reads as follows:

“Notice of Motion

Let all parties concerned attend the Judge in Court at the Law Courts, Kampala, on Wednesday, October 12, 1966, at 10.30 o'clock in the forenoon, when the Court will be moved on the hearing of an application on the part of the plaintiff that summons having been served on the defendant on February 10, 1966, and the defendant having failed to file appearance or defence this Honourable Court be pleased to enter judgment against the defendant under r. 6 of the Civil Procedure Rules (Legal Notice 101 of 1959) and costs hereof be provided.”

I have taken the trouble to set out in extenso the notice of motion which was filed by the plaintiff in this

matter and a copy of which was served on the defendant because the submission of the counsel for the plaintiff is that, since the

application was brought under r. 6 of the Civil Procedure (Government Proceedings) Rules this Court should treat it as an application for leave to enter judgment against the defendant.

It is unnecessary to point out that the language of the motion is plain and unambiguous. What the motion seeks is certainly not leave to enter judgment against the defendant, but judgment to be entered at once in favour of the plaintiff. No satisfactory reason has been advanced by counsel for the plaintiff in support of the submission that it is competent for this court to treat the application as one for leave, despite the plain language of the motion itself. The mere statement in the motion paper that the application was brought under r. 6 of the Civil Procedure (Government Proceedings) Rules, 1959, cannot, in my view, operate to change the nature of this application.

Surely the provisions of r. 6 of the Civil Procedure (Government Proceedings) Rules cannot be authority for this court to treat a wrong and disorderly motion, which, on the face of it, seeks a judgment to be entered against the defendant and in favour of the plaintiff as an application for leave only. No authority has been cited to the court in support of this proposition. In spite of the fact that the error, apparent on the motion paper, was pointed out on a number of occasions to the counsel for the plaintiff, no attempt was made to apply to this court for leave to amend the motion to express the appropriate relief, which ought to be sought compatible with r. 6 of the Civil Procedure (Government Proceedings) Rules.

Furthermore, there is even a more serious defect in law in this application. The provisions of r. 6 of the Civil Procedure (Government Proceedings) Rules, 1959 (Legal Notice No. 101 of 1959), upon which this application is based, are in the following terms:

“Judgment shall not be entered, and no order shall be made, against the Government in default of appearance or pleading under any provision of the principal rules without the leave of the Court, and any application for such leave shall be made by *summons* served not less than seven days before the return day.”

As already observed, this application has been brought to this court by a notice of motion and not, as provided for in r. 6 of the Civil Procedure Rules reproduced above, by *summons*. The provisions of r. 6 of the Civil Procedure Rules as to the method of applying to the court for leave is stringent and mandatory. The stipulation is that “any application for such leave *shall* be made by *summons*”. The provision of the rule, as regards the mode of or procedure for asking for leave, fortifies the view, which I take, that the application before this court having been brought by a notice of motion could not have been meant as an application for leave to enter judgment for the plaintiff.

In the absence of a prior leave of court properly obtained for judgment to be entered in favour of the plaintiff, this court is not competent to entertain this application on the ground that it is premature and misconceived. Moreover, I think it is also right to hold, and I do so hold, that the application is not properly before this court for want of compliance with r. 6 of the Civil Procedure (Government Proceedings) Rules, 1959, since the application was brought by *motion* instead of by *summons*.

The application is therefore refused. Costs of the application to the defendant.

Preliminary objection upheld in each case. Both applications dismissed.

For the plaintiff:

Haque & Gopal, Kampala

S. P. Singh

For the defendant:

The Attorney-General, Uganda

A. S. J. Tibamanya (State Attorney, Uganda)

D W Olocho and Joel Kanja v County Council of Nyandarua
[1966] 1 EA 467 (HCK)

Division: High Court of Kenya at Nairobi
Date of judgment: 11 November 1966
Case Number: 654 and 655/1966
Before: Rudd J
Sourced by: LawAfrica

[1] Master and servant – Wrongful dismissal – Summary dismissal – Refusal to obey lawful order – Employee asked to despatch circular with pay packet – Refusal to do so – Warning given to employee that if refusal persisted might have serious consequences.

Editor's Summary

The two plaintiffs were employees of the defendant and in addition they represented the local branch of the Kenya Local Government Workers Union on the joint staff committee of the defendant. At a meeting between the plaintiffs and the officers of the defendant pay increases for the subordinate staff were agreed and it was decided that the staff should be informed of this by a circular to be enclosed in the pay packet for December of every member of the staff. The circulars were sent to the revenue office for inclusion in the pay packets. The two plaintiffs were in charge of that office, as a revenue officer and a chief clerk respectively. They disliked the third paragraph which stated that the position had been put to the Union and accepted by it. Both the plaintiffs then withheld the circulars from the pay packets. When the treasurer of the council became aware of the situation he told the plaintiffs that the circulars must be put in the pay packets and later the plaintiffs were warned that if they persisted in their refusal it might have very serious consequences. The plaintiffs were summarily dismissed for disobedience whereupon they sued the defendant for wrongful dismissal.

Held –

- (i) the refusal to have the circulars included in the pay packets, notwithstanding that the plaintiffs were warned that this refusal if persisted in might have very serious consequences, constituted wilful refusal to obey a lawful order on the part of the second plaintiff and at least wilful disobedience and wilful interference on the part of the first plaintiff to prevent the despatch of the circulars;

- (ii) the dismissals were not wrongful.

Suits dismissed.

Cases referred to in judgment:

(1) *Laws v. The London Chronicle*, [1959] 2 All E.R. 285.

Judgment

Rudd J.: These two actions for damages for wrongful dismissal arise out of virtually the same facts which are so similar and connected that the two cases were tried as one.

The plaintiff in Case No. 654/66, D. W. Olocho according to the title of the suit but in fact according to his evidence D. K. Olocho, was employed by the Nyandarua county council as a Revenue Officer at a salary of Shs. 1,495/- a month terminable on three months' notice.

The plaintiff in Case No. 655/66, Joel Kanja according to the title but Joel Kanja Samuel Njoroge according to the evidence, was employed by the same county council as Chief Clerk at Shs. 1,245/- per month terminable on three months' notice.

Both plaintiffs were suspended from duty early on the morning of January 3, 1966, and were dismissed by the council later that day.

Both plaintiffs were entitled to earned leave of less than three months. They claim that they were wrongfully dismissed. If the claims are good the most that could be awarded as damages and the amounts that I would award as damages if the suits succeeded would be three months pay, plus the equivalent of three days' pay for January to be included in the damages for the first three days of January, 1966. The county council admits liability for 2 1/2 days of these three days and has never disputed liability to pay for these 2 1/2 days which was in fact referred to in the minutes of the resolution for the dismissals.

The county council defends the suits on the ground that the dismissals were lawful and justified on the grounds of wilful disobedience to reasonable and lawful orders. In addition to their positions in the county council the plaintiffs were respectively the secretary and the chairman of the local branch of the Kenya Local Government Workers Union and represented that Union on the joint staff committee of the county council.

If the recommendations of the Pratt Commission were applied to and implemented by the county council increases in pay would be paid with retrospective effect to members of the county council's staff generally.

On July 10, 1965, a negotiated agreement to which the plaintiffs were parties was effected between the county council and the Union whereby it was recorded:

- "(1) Subject to the Minister of Local Government approval and subject to the additional grant being made available the council and the Union agreed that payment of the increased wages contained in this agreement will be paid as shown in the attached schedule to all employees covered by the scope of this agreement with effect from January 1, 1965, such payment being made on or before July 15, 1965, provided the said grant is made available to the council before the said date.
- (2) Should the council fail to receive the grant stated above the parties to this agreement will meet to discuss ways to overcome the problem."

The schedule is not before me but I understand that it was in effect according to the Pratt recommendations.

Subsequent to this agreement the council did not receive the additional grant referred to in the agreement and consequently the first paragraph of the agreement failed under the condition and proviso contained therein.

In consequence further negotiation between the plaintiffs on the one side and acting chairman and acting clerk who signed the agreement for the council should have taken place in accordance with the second paragraph of the agreement.

Instead of this a negotiating committee was set up consisting of the plaintiffs and the secretary of the Union from its head office as well as members of the council with the council clerk, treasurer and committee clerk in attendance. The function of this negotiating committee was to act under para. 2 of the agreement.

Meetings were held on November 12 and 25. The plaintiffs and Mr. Ochino for the Union head office attended both these meetings and a Mr. Namisi also for the Union headquarters attended the meeting held on November 25. Records of the proceedings at these meetings were made out by the council and circulated to the members in due course. There is evidence that these records were true and accurate

records of the proceedings. No one before this case questioned either their truth or their accuracy and subject to the comments I make in this judgment I accept these records as substantially true and accurate records made

in good faith. In effect at the meeting of November 12 the committee was informed that the additional grant had been refused and that consequently the agreement for general increases of salary according to the previous schedule failed.

It was stated that council had not sufficient funds to make any increases of salary to the whole staff but that if that position was accepted the council was prepared to grant one or two increments to the subordinate staff. Discussion followed and finally at that meeting the further consideration of the matter was postponed to another meeting which was held on November 25. At the meeting of November 25 the Union representatives fought hard for the staff as a whole. First they asked for implementation of the Pratt recommendations and for further representations to be made to Government for the additional grant. When this failed they submitted that what money there was should be used to give some increases to the whole staff but this was refused. The council members said they could not accept that. Then the Union representatives said they would accept the proposed increases for the subordinate staff but wanted to go on to discuss the position as regards the rest of the staff. But council members or the treasurer pointed out that in the situation that then existed the offer to make increases of wages to the lower staff was dependent upon the abandonment of the claim for increases for the rest of the staff and it was stated that if that was not recognised the offer would fall through. Eventually the Union members agreed that the proposed increases to the subordinate staff should be made by the council and that was agreed by the whole committee.

Now I am quite sure that the council's officers in attendance took it that the Union representatives were agreeing to the abandonment of the claims of the staff other than the subordinate staff in return for the increases for the subordinate staff. That was the logical position by clear implication but I doubt that the Union representatives ever expressly agreed to that though there was as I have said a clear implication that that was the case.

I believe it to be possible however that once the payments to the subordinate staff had started to be effected the Union members had it at the back of their minds that they might attempt to raise the question later in some way as regards increases for the rest of the staff. If that be so and I think it may well have been so it can nevertheless be said that by the time of the end of the meeting that probability had not been expressed as a live possibility. It had been raised earlier and had been allowed at least by implication to be dropped. In the circumstances the council's officers in attendance could fairly think that it had been abandoned in return for the increases to the subordinate staff which were to be effective as from December 1, 1965.

In the ordinary course it would be necessary for the Council to inform its staff of the result of the negotiations with the Union and it was decided that this should be done by way of a circular to be enclosed in the pay packet for December of every member of the staff.

A circular was prepared by the clerk and approved by the chairman of the council and the chairman of the Finance and General Purposes Committee. The circular read as follows:

“County Council of Nyandarua

Pay Increases for Subordinate Staff

Effective From December 1, 1965

As you may know, the recommendations made by the K.L.G.W.U. for the implementation of pay increases under the Pratt Report were not successful due to a special grant not being available for this purpose from

Central Government, which was always the council's condition of negotiation.

With the break-down of these negotiations, the council agreed to give consideration to pay increases (not to be based on Pratt in any way) and in the spirit of the established African Socialism decided that the limited money which could be available for this purposes should be used for raising the standard wage of the lower-paid employees, i.e. the subordinate staff.

The council's proposition was put to the K.L.G.W.U., and was accepted for implementation on December 1, 1965.

This means that all Staff in salary scales J to P inclusive will have received an increase in pay in December, as follows:

Salary Scales L to P inclusive – two increments

Salary Scales J to K inclusive – one increment.

The Chairman of council and his councillors are pleased to be able to announce these negotiated increases in pay to the lower-paid employees, which they trust will assist them in some measure.

HWS/GMT.

December 28, 1965."

These circulars were then sent on December 30 to the pay or revenue office for inclusion in the pay packets.

The two plaintiffs were in charge of that office. I think the chief clerk was the person primarily responsible for supervising the inclusion of this circular in the pay packets. I think it could probably be argued that this was not the duty of the Revenue Officer though he was in the office and could be expected to co-operate and certainly not to hinder this work. Both the plaintiffs read the circular and both disliked the third paragraph which stated that the proposition had been put to the Union and accepted by it. Both the plaintiffs then decided to withhold the circulars from the pay packets and did withhold them.

At this stage there is a conflict in the evidence. The plaintiffs say they went to consult the treasurer who said he would see the clerk to the council and that subsequently the treasurer told them he had not seen the clerk until January 3 and that that is one reason why the circulars were not included in the pay packets. This is contrary to the evidence of the treasurer and the clerk. The treasurer says that he was told by the deputy treasurer that the plaintiffs were preventing the inclusion of the circulars in the pay packets, that he went to the pay office seeing both the plaintiffs there and told them that the circulars must be put in the pay packets and that later that day the plaintiffs came to him and when they reiterated their refusal he told them that continued refusal might have very serious consequences. I accept the evidence of the treasurer on this and reject the evidence of the plaintiffs where it conflicts with the evidence of the treasurer on this point.

I find that the plaintiffs together point blank refused to have the circulars included in the pay packets notwithstanding that they were warned that this refusal if persisted in might have very serious consequences for them. I find that this constituted wilful refusal to obey a lawful order on the part of the chief clerk and at least wilful disobedience and wilful interference on the part of the Revenue Officer to prevent the despatch of the circulars. Whether or not the inclusion of the circulars in the pay packets was strictly within the scope of the work of the Revenue Officer he took it upon himself to interfere and prevent a lawful order from being carried into effect. In the circumstances he must be considered to be as guilty of wilful misconduct and disobedience as the other plaintiff.

Both plaintiffs were in this together acting deliberately and in concert, and I hold both to be liable for the consequences. The circulars due to the action of the plaintiffs were not included in the pay packets.

On January 3 the plaintiffs were both suspended by their head of department. They were summoned before the clerk to the council and admitted to him that they had been disobedient. The clerk could have dismissed them or had them dismissed there and then subject to confirmation by the council but he decided to refer the matter first to the Finance and General Purposes Committee which he convened that day as a matter of urgency. This committee assembled and asked to hear the plaintiffs who by that time had left the office. The committee despatched the Deputy Treasurer to find the plaintiffs and ask them to attend the meeting. He found the plaintiffs and conveyed the message but the plaintiffs refused to attend the meeting. The committee then sent the clerk to council together with the Deputy Treasurer to ask the plaintiffs to attend the meeting. Again the plaintiffs refused even though they were told that they would be allowed to put forward their defence. I accept the evidence of the clerk and the Deputy Treasurer on this. The committee then enquired into the matter and passed a resolution dismissing the plaintiffs with loss of all privileges from January 4, 1966, except for the 2 1/2 days they had worked.

In these circumstances it is undoubted that both the plaintiffs were guilty of wilful disobedience.

The circular on a careful reading did no more than convey the result of the proceedings of November 25. It is in no way inaccurate. The Union members did accept the proposition that the increases should be given to the subordinate staff with effect from December 1. It was not unreasonable for the council to wish the staff to be informed of the result of the negotiations and of the reason or some of the reasons for the limited assistance that was being made. The inclusion of the circular in the pay packets was a reasonable method of promulgating that information.

The plaintiffs as Union representatives on the joint staff committee were entitled to make representations to their Head of Department with a view to having the circular amended or withdrawn but they were not entitled to do more than make representations. They were not entitled to disobey the head of department and bring his instructions to nought after he had refused to comply with their representations.

Thereafter they should have allowed the order to have effect and the circulars, which were circulars from the council not from the plaintiffs and not even from the negotiating committee, should have been included in the pay packets as ordered. Of course the plaintiffs could themselves have taken steps out of office hours to make any separate communication or criticism or explanation to the staff but they were not entitled to cause the council's communication to be stifled. This is wilful disobedience such as to justify dismissal without notice unless it can be said that it was minor disobedience and not disobedience of such a nature as not to justify such dismissal.

I agree that wilful disobedience such as to justify dismissal without notice must be serious disobedience and not relatively minor or trivial disobedience in the circumstances of the case. It must amount to a repudiation of the contract of service. The facts of this case are in my view so different from those in *Laws v. The London Chronicle* (1) that although I accept and agree with the principle of that decision, I find the actual result of that case inapplicable to the present case.

As regards the chief clerk this was a deliberate flouting of a reasonable and lawful order on a matter of business of serious concern to the council and completely inconsistent with his duty to the council as an employee thereof.

As regards the Revenue Officer although there is a question as to whether the supervision of the inclusion of the circular in the pay packets was technically within the scope of his office he did not stand idly by but associated himself in the other plaintiff's disobedience in a matter and in a manner which was quite inconsistent with his service as a loyal officer and employee of the council.

I find that the dismissals were not wrongful and I dismiss both cases with costs. As regards costs the taxing master is directed to make suitable allowance for the fact that apart from the pleadings the two cases were virtually based on the same facts and were heard together at one hearing.

Suits dismissed.

For the plaintiffs:

Gautama & Gautama, Nairobi

A. Jamidar

For the plaintiffs:

B. Georgiadis, Nairobi.

Seringa Jill Birgit Gotke v Settlement Fund Trustees
[1966] 1 EA 472 (HCK)

Division:	High Court of Kenya At Nairobi
Date of judgment:	11 November 1966
Case Number:	1136/1965
Before:	Farrell J
Sourced by:	LawAfrica

[1] Execution – Attachment before judgment – Gratuitous transfer of movable – Fraud on creditors – Originating summons issued objecting to attachment – Whether transfer can be avoided in objection proceedings – Whether separate suit should be filed to set aside transfer – Civil Procedure (Revised) Rules – O. 21, r. 58 and O. 38, r. 5 (K.) – Indian Transfer of Property Act, s. 53.

Editor's Summary

The defendants had filed a suit which was still pending against G., the objector's husband, for Shs. 90,520/- for a partial failure of consideration on a contract of sale of cattle. On the same day they made an application under O. 38, r. 5 for attachment before judgment of an aircraft alleged to belong to G. but claimed by the objector as her own property. The objector, as plaintiff, took out an originating summons under O. 21, r. 58 objecting to the attachment. G. left Kenya on August 16, 1965, after gratuitously transferring the aircraft to the plaintiff with effect from August 14, 1965. Also on August 16, 1965, the

plaintiff informed the Director of Civil Aviation that she had authorised C. to dispose of the aircraft on her behalf. It was submitted on behalf of the defendants that a reasonable inference to be drawn from the transfer of the aircraft, was to put a valuable asset out of reach of the defendants, that the transfer was a mere sham which was ineffective to pass any property and that even if the transaction were valid it was one which the court should set aside. In support of this proposition the defendants relied on s. 53 of the Transfer of Property Act as applied to Kenya. On the other hand, counsel for the plaintiff argued that s. 53 *ibid.* only applied to immovable property and that it was of no consequence here if in India the law was stretched to include movable property, that the defendants could not be regarded as creditors since it had not been established that any debt was owed to them by G., and that the transfer remained valid until set aside and could not be set aside in these proceedings.

Held –

- (i) the purpose of the transfer of the aircraft was to put a valuable asset out of the reach of the defendants should they succeed in their claim against G.;

- (ii) the law to be applied in Kenya in respect of the transfer of movable property in defraud of creditors is by virtue of the Kenya Colony Orders in Council, 1921, s. 4 (2) the same as the law formerly applied in India before the enactment of s. 53 of the Indian Transfer of Property Act, 1882, namely, as declared by the Fraudulent Conveyances Act, 1571;
- (iii) there was ample authority to show that an intent to defraud creditors may be found where the persons prejudiced were not creditors at the time of the transaction;
- (iv) there was no doubt that it was open to the defendants to avoid the fraudulent transfer in these proceedings because an unequivocal declaration of intention to do so was sufficient;
- (v) the plaintiff had no legal or equitable title to the aircraft and the defendants were entitled to proceed with their application for attachment before judgment.

Objection proceedings dismissed. Order accordingly.

Cases referred to in judgment:

- (1) *Abdool Hye v. Mir Mohamed* (1883), Cal. 616.
- (2) *Chidambaram Chettiar v. Sami Aiyar* (1907), 30 Mad. 6.
- (3) *Patel v. Patel*, [1958] E.A. 743.
- (4) *Fazal Kassam (Mills) Ltd. v. Abdul Nagji Kassam and Another*, [1960] E.A. 1042.
- (5) *Barwell v. Bishopp* (1860), 54 E.R. 689.
- (6) *Shears v. Rogers* (1832), 110 E.R. 137.
- (7) *Harrods Ltd. v. Stanton*, [1923] 1 K.B. 516.
- (8) *Edwards v. Edwards*, [1904] P. 362.

Judgment

Farrell J: By this originating summons the plaintiff objects to the attachment by the defendants of an aircraft alleged to belong to her husband but which she claims as her own property.

The aircraft in question was attached before judgment pursuant to an order of the court in a suit originally brought by the present defendants (to whom I shall refer as “the Trustees”) against the husband of the plaintiff, one Torben Gotke (to whom I shall refer as “Gotke”). In those proceedings the trustees alleged that Gotke sold a herd of cattle to them for Shs. 183,750/-, after previously selling a portion of the herd, numbering 234 cattle, to the Muramati Co-operative Society (to which I shall refer as “the Society”). On the footing of a partial failure of consideration the Trustees claimed back from Gotke Shs. 90,520/-. Subsequently by order of the court the Society was added as a second defendant. The suit was originally filed on August 28, 1965. On the same date an application was made under O. 38, r. 5, for attachment before judgment of the aircraft the subject of the present proceedings. An order for attachment was made on August 30, and was executed either on the next day or September 1. The attachment has never been raised, but by consent of the parties the aircraft has subsequently been sold and the proceeds of sale deposited in court to await the decision in the present proceedings.

The court is at present not directly concerned with the matters in issue in the suit, which is still pending. It is sufficient to note that the ownership of the cattle in question is disputed, and that the allegation has been made (rightly or wrongly) that Gotke having sold the cattle to the Society and received a substantial portion of the agreed purchase price, subsequently purported to sell the same cattle to the Trustees. It is in evidence that Gotke had been for some time preparing to leave Kenya, and had been making arrangements to this end and disposing of his assets

since about August, 1964. On the August 13, 1965, a letter was written by Messrs. Archer and Wilcock, the advocates of the Society, to the Trustees, with copies (inter alia) to Gotke and his advocate, informing the Trustees of the prior sale of the cattle by Gotke to the Society, and of the Society's claim to them. This letter was received by Mr. Lees on behalf of the Trustees on the following morning, a Saturday. Mr. Lees immediately tried to get in touch with Gotke by telephone to Nanyuki, but the telephone call was received by his wife (the plaintiff), who according to Mr. Less told him that there had been some misunderstanding on the part of the Society and that Gotke would take legal action against the Society and keep the Trustees informed. This is not denied by the plaintiff in her replying affidavit.

After this events moved rapidly. On August 15, a Sunday, Gotke and the plaintiff flew from Nanyuki to Nairobi, and spent the night at the Aero Club at Wilson Airport. On Monday, August 16 an application was made by Gotke to register a transfer of the aircraft to the plaintiff (his wife) with effect from August 14. A pencil note on the form of application requested that the matter should be hurried and completed by the afternoon. The registration of the transfer was duly completed, and on the same day the plaintiff informed the Director of Civil Aviation that she had authorised Mr. Campling to dispose of the aircraft on her behalf. Finally, on the same evening Gotke and the plaintiff left Nairobi by Scandinavian Air Services and have remained out of Kenya ever since.

It is submitted on behalf of the Trustees that the only reasonable inference to be drawn from the above facts is that the purpose of Gotke in transferring the aircraft into his wife's name was to put a valuable asset out of the reach of the Trustees in the event of their succeeding in their claim against him. No explanation whatever has been put forward either by Gotke or the plaintiff for the transfer, and that being so and having regard to the circumstances in which the transfer was made the court unhesitatingly draws the inference for which the Trustees contend and finds that the purpose of the transfer was as they allege.

A more difficult question is to determine the legal effect of the transfer. For the plaintiff it is submitted that the transfer was effective to pass the legal ownership of the aircraft to the plaintiff, and that, even if the worst is assumed against the plaintiff and Gotke, and the intention was to defraud his creditors, nevertheless the transfer is valid until set aside, and cannot be set aside in these proceedings.

For the defendants it is first of all argued that the transfer was a mere sham and a colourable transaction which was ineffective to pass any property. Such a possibility is recognised in some of the cases cited, and in particular reference may be made to "benami" transactions; but I do not find any circumstances from which such a conclusion may be reached in the present case, and I think the defendants themselves rely principally on the second limb of their argument, that the transaction was valid in the first place but is one which the court should set aside.

In support of this proposition counsel for the defendant submits that the law of property in Kenya is the Indian law, and relies on s. 53 of the Transfer of Property Act as applied to this country which, so far as relevant, reads as follows:

"Every transfer of immovable property made with intent . . . to defeat or delay the creditors of the transferor, is voidable at the option of any person so . . . defeated or delayed.

Where the effect of any transfer of immoveable property is to . . . defeat or delay any such person, and such transfer is made gratuitously . . . the transfer may be presumed to have been made with such intent as aforesaid.

Nothing contained in this section shall impair the rights of any transferee in good faith and for consideration.”

Assuming that the section applies, it is conceded that the transfer was gratuitous, so that if necessary it would be open to the Trustees to pray in aid the second paragraph; but as I have already made a finding as to the intention of the transfer, I do not need to consider this paragraph any further. Nor in this case is there any question of a third party taking bona fide and for value.

The primary difficulty, however, which faces the Trustees is that the section expressly applies to immovable property, and by implication does not apply to movable property.

The Indian law in this regard has had a curious history. It is common ground that s. 53 is based on an ancient English statute, 13 Eliz. c. 5, sometimes referred to as the Fraudulent Conveyances Act, 1571. This statute was in very general terms and applied to all kinds of property, movable or immovable, and before the Transfer of Property Act was first enacted in 1882, was held to be of general application in the courts of India. This is clearly recognised in the Privy Council decision in *Abdool Hye v. Mir Mohamed* (1), a case which arose before the Act was passed, although the final decision was subsequent to its enactment. There is accordingly no reference to the statutory provision in the record of the proceedings which were conducted on the basis of the pre-existing law. It is sufficient to set out the opening paragraph of the headnote ((1883), 3 Cal. at p. 616):

“Whether or not the statute 13 Eliz. c. 5 . . . is more than declaratory of the common law, so far as it avoids transactions intended to defraud creditors, its principles and those of the common law for avoiding fraudulent conveyances have received effect in the Indian courts, and have properly guided the decisions of the courts in administering law according to justice, equity and good conscience.”

Such being the law administered at the time, there was enacted the Transfer of Property Act, 1882, containing the section already set out, and at the same time by s. 2 repealing (inter alia) the whole of the statute 13 Eliz. c. 5. If it had not been for the repeal provision, it might have been argued that, as the section was expressly applied only to immovable property, it was intended that the older statute, or the common law which it embodied, should be left to apply to movable property. But such a construction appears impossible in the light of the repeal of the statute, and the question has arisen in subsequent Indian cases whether s. 53 applies to movable property, and, if not, whether the ancient laws against transactions in defraud of creditors no longer apply where the property transferred is movable.

The question arose in the Madras High Court in *Chidambaram Chettiar v. Sami Aiyar* (2), a case concerned with the assignment of a decree. The following passage is taken from the judgment ((1907), 30 Mad. at p. 9):

“The property sought to be assigned, not being immovable property, s. 53 of the Transfer of Property Act has no direct application, and we must decide the question by reference to general principles of justice, equity and good conscience. As observed by the Judicial Committee of the Privy Council in *Corlett v. Radcliffe* (15 E.R. 257) each case must depend on its own circumstances, and in all the question is one of fact whether the transaction was bona fide or was a contrivance to defraud creditors. It may, however, be stated generally that a deal is void against creditors when the debtor is in a state of insolvency or when the effect of the deal is to leave the debtor without the means of paying his present debts. If this is the condition of the debtor, or the consequence of his act, it is not sufficient to render a deal valid that it should be made upon good consideration, for

as it is said in *Twyne's* case (3 Cr. Rep. 80) 'a good consideration does not suffice if it be not also bona fide'. This statement of the law is sufficient to support the conclusion of the subordinate judge that the assignment was invalid."

From this it is clear that the Madras High Court, while holding that s. 53 is limited in its application to immovable property, had no hesitation in setting aside a fraudulent transfer of movable property "by reference to general principles of justice, equity and good conscience", and in effect applied 13 Eliz.c. 5, notwithstanding its repeal by the Transfer of Property Act. The case subsequently went to the Privy Council, where the decision was upheld in a short judgment which did not specifically deal with the point at present under consideration.

It may be noted also that, according to Mulla on The Transfer of Property Act (4th Edn.) at p. 251, the Rangoon High Court has applied s. 53 to movables on similar principles, but the case cited as not available here.

This appears to be all the authority on the point, and while it is slender in quantity, it does not appear that there is any decision to the contrary, and I think it is sufficient to establish that in 1897 when the Transfer of Property Act was first applied to Kenya, the law in India was that, while s. 53 directly applied only to transfers of immovable property, its principles were applicable also to transfers of movable property, so that the section, in terms of the Rangoon decision (which in fact was of much later date) "fastens itself to transactions relating to movable property" (see Daramshaw on The Transfer of Property Act (1st Edn.) p. 320).

Counsel for the plaintiff nevertheless argues with some force that what was applied to Kenya in 1897 was not the law as administered by the Indian courts, but the statute itself. On its plain terms s. 53 applies only to immovable property, and it is of no consequence here if in India the law was stretched. So far there is considerable force in his argument, but with respect he undermines his own cause when he goes on to submit that if any gaps in the Indian law are to be supplied, recourse should be had not to Indian law but to the principles of common law and equity. The Indian decisions to which reference has been made are themselves based on "the principles of justice, equity and good conscience", and the suggestion in *Abdool Hye v. Mir Mohamed* (1) that the statute 13 Eliz. c. 5 is merely declaratory of the common law is confirmed by the statement in *Kerr on Fraud and Mistake* (7th Edn.), at p. 299 that "it has been frequently observed that 13 Eliz. c. 5, was merely declaratory of what was previously the common law of the land". Moreover, counsel for the plaintiff pointed out that both in Uganda and Tanganyika 13 Eliz. c. 5 has been held to apply. See *Patel v. Patel* (3) and *Fazal Kassam (Mills) Ltd. v. Abdul Nagji Kassam and another* (4). If that is right, it would appear by parity of reasoning that the statute should apply equally in Kenya, unless the position in this country is affected by the express repeal of the statute by the Transfer of Property Act, 1882. The problem of construction posed by that fact is not an easy one to resolve, but I think that the difficulty can be overcome by reference to the wording of s. 4 (2) of the Kenya Colony Order in Council, 1921, reproducing the language of earlier Orders in Council, which provided that civil and criminal jurisdiction should, so far as circumstances admit, be exercised in conformity with the various Indian Acts in force in the Colony "and subject thereto and so far as the same shall not extend or apply shall be exercised in conformity with the substance of the common law, the doctrines of equity and the statutes of general application in force in England on August 12, 1897". There can be no question that 13 Eliz. c. 5 is a statute of general application and was in force in England at the material date, and I am satisfied that the wording of the Order in Council is wide enough to make it applicable in Kenya, notwithstanding the repeal of the statute by the Transfer

of Property Act, so that the repeal is no more effective in this country, than it appears to have been in India, to exclude the application of the principles underlying the statute to transfers of movable property.

For the above reasons I hold that the law to be applied in respect of the transfer of movable property in defraud of creditors is the same as the law formerly applied in India (before the enactment of s. 53) and I shall further assume that the law so applied differs in no material respect from the law applied in England prior to the enactment of s. 172 of the Law of Property Act, 1925, which superseded the statute of Elizabeth.

Even on the assumption that the case is to be decided on the same basis as if the statute of Elizabeth applied, there remain for consideration certain objections made on behalf of the plaintiff. The first is that the statute, being one for the protection of creditors, can have no effect unless it is first shown that the person prejudiced by the transaction was a creditor. In this case it is argued that the Trustees cannot be regarded as creditors, since it has not been established that any debt was owed to them by Gotke.

I find that there is no substance in this contention. There is ample authority to show that an intent to defraud creditors may be found where the persons prejudiced are not creditors at the time of the transaction. The following statement is taken from Kerr on Fraud and Mistake (7th Edn.) at p. 321:

“A voluntary conveyance is void under the statute as against subsequent creditors of the grantor, if it was made by him with the express or actual intention of delaying, hindering or defrauding his creditors thereby; whether the grantor was then in embarrassed circumstances or not; and whether or not any debt he then owed remained unpaid.”

An even more pertinent passage occurs at p. 326:

“A voluntary conveyance pendente lite, or by a person against whom an action for damages is pending, and which he must have known would probably go against him, is always open to the imputation of fraud, though at the time of the settlement he was not in debt; unless the pending action is a claim for damages of a very speculative character, and the probability of substantial damages is slight.”

There follows a short consideration of the case of *Barwell v. Bishopp* (5), in which it was held by Romilly, M.R., that it was a necessary inference that the deed sought to be set aside was executed with a view to defeating persons who might become the settlor's creditors, and that it was therefore void under the statute as against his creditors. In the course of his judgment the learned Master of the Rolls said ((1860) 54 E.R. at p. 689):

“There are many modes by which a person may be ‘hindered’ of his just and lawful actions, debts and damages, and by which creditors may be defrauded, though the grantor may not be indebted at the time.”

Enough has been cited to show that the statute may apply in favour of a person who may not have established that he is a creditor at the time of the transfer, without praying in aid the dictum of Mulla (loc. cit) at p. 250 that under the Indian law –

“the term creditor . . . includes not only those who have proved their claim and obtained a decree and are designated judgment-creditors but also ordinary creditors who have still a claim to prove.”

Before leaving this topic it is perhaps desirable in order to avoid misapprehension that I should indicate that I have been primarily concerned with

the legal objection that the Trustees were not at the material time creditors, and that in terms of the second passage quoted from Kerr, while I am satisfied that the claim in the suit is not of a speculative character, I am not to be taken as having found that Gotke “must have known” that the decision would probably go against him. For the purposes of the point presently under consideration I do not think it is necessary to go so far as that. It would be sufficient to find, in the terms used by Romilly, M.R., in the case cited, that the transfer “was to provide for the worst which might happen, by conveying away his property beforehand”; and if that finding is not implicit in the facts I have already found, I have no hesitation in so finding.

I turn now to the last point of objection on which counsel for the plaintiff appears principally to rely, that even if the statute applies and even assuming the worst against his client, nevertheless the transaction remains valid until set aside and cannot be set aside in these proceedings. This is not an altogether easy point. The statute of Elizabeth in terms describes the transactions within its ambit as void; but in practice they have always been treated as voidable, and it may be noted that when the provisions of the Act were codified in s. 53 of the Transfer of Property Act, the word “voidable” was substituted for the word “void” in the statute. A similar substitution was made in s. 172 of the English Law of Property Act, 1925, as to which Kerr, loc. cit., at p. 298 remarks:

“It will be noted that the Law of Property Act, 1925, contains no provision with regard to penalties, but otherwise it seems in effect to re-enact the provisions of 13 Eliz. cap. 5, and it seems that cases decided under the former Act are applicable to the latter.”

No further authority is necessary to show that, whatever the law to be applied, the transactions affected are to be treated not as void ab initio, but as voidable, and the question is what are the steps to be taken by a creditor to set them aside. It was, of course, always open to a creditor to bring a suit specifically for this purpose, and it is implicit in the argument on behalf of the plaintiff that unless and until this is done, the transaction remains valid. But this is not the only remedy open to the creditor. The position is most clearly set out in Mulla, loc. cit. at p. 249:

“The transfers referred to in this section (s. 53) are transfers in fraud of creditors which are valid until they are avoided, and which are voidable at the option of any creditors defrauded, defeated or delayed . . . If the creditor sues to avoid the transfer he must file a representative suit on behalf of all the creditors . . . But he may manifest an intention to avoid the transaction otherwise than by filing a suit, e.g., by attaching the property transferred. In *Oakes v. Turquand & Harding* (1867), L.R. 2 H.L. 325, the House of Lords said that voidable transactions may be avoided by any open or unequivocal declaration of an intention to avoid them. Accordingly in a Madras case, *Ramaswami Chettiar v. Mallappa Reddiar* (1920), 43 Mad. 760, Wallis, C.J., said – ‘I am of the opinion that it is open to the judgment-creditor by virtue of s. 53 of the Transfer of Property Act to attach as the property of the judgment-debtor property which has been fraudulently transferred to the claimant with intent to defeat or delay creditors. If he knows of the transfer when he applies for attachment, the application is sufficient evidence of his intention to avoid it; if he only hears of the transfer when a claim petition is preferred under O. 21, r. 58, and still maintains his right to attach, that again is sufficient exercise of his option to avoid.’”

If any further authority is needed, reference may be made to *Shears v. Rogers* (6), in which Littledale, J., ((1832) 110 E.R. at p. 140) said:

“The assignment was void as soon as the creditors claimed to treat it as such, though not until then.”

In *Harrods Ltd. v. Stanton* (7) the earlier English cases were fully considered and it was held by McCardie, J., that *Shears v. Rogers* (6) must be read in the light of certain other decisions affecting the rights of a subsequent bona fide purchaser for value, a point that does not arise here. But what is significant about that case is that the issue arose in interpleader proceedings, and while the rights of the bona fide purchaser were upheld as against the creditors, there was no suggestion that it was not open to the creditors to seek to have the alleged fraudulent conveyance set aside, not by a suit for that purpose, but in interpleader proceedings. Similarly in *Edwards v. Edwards* (8) a conveyance was impeached in garnishee proceedings.

On the authority of the cases cited I have no doubt that it is open to the trustees to challenge the validity of the transfer in these proceedings, and while counsel for the plaintiff is so far right when he claims that the transaction is valid until set aside, he fails in his further submission that it cannot be set aside in these proceedings.

It follows that the objection proceedings fail and that the attachment is upheld. The answer to the first question is that the plaintiff has no legal or equitable title to the aircraft the subject of the proceedings against the trustees as creditors, and the answer to the second question is that the trustees are entitled to proceed with their application for attachment before judgment, and as the aircraft has been sold, the proceeds of sale will be retained in court and made available to the Trustees for satisfying any claim that they may establish against Gotke in the suit.

Objection proceedings dismissed. Order accordingly.

For the plaintiff:

Daly & Figgis, Nairobi

P. Hewitt

For the defendant:

Satish Gautama, Nairobi

M B Automobiles v Kampala Bus Service [1966] 1 EA 480 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	28 October 1966
Case Number:	320/1966
Before:	Sir Udo Udoma CJ
Sourced by:	LawAfrica

[1] Practice – Service of summons – Allegation that a clerk pointed out the manager of defendant firm

to process server – No such disclosure in affidavit of service – Manager not known to process server – Whether such non-disclosure renders service defective-Onus on defendant to satisfy court that summons not duly served – Civil Procedure Rules, O. 5, r. 15, O. 9, r. 24 and O. 27, r. 3 (b) and r. 10 (U.).

Editor's Summary

The respondent in this case had obtained an ex parte judgment and decree for a sum of Shs. 2,523/35 in the High Court against the defendant in default of either an appearance or a defence. The former defendant now applied by notice of motion under O. 9, r. 24 to set aside the ex parte judgment and decree and in the supporting affidavit, Shaban, the proprietor and manager of the applicant firm stated, inter alia, that the summons in the suit was not served on him, that he did not owe the amount claimed and that he came to know for the first time that an action had been instituted and judgment and decree passed against him when the court bailiff attached his moveable property. In reply the respondent filed an affidavit in which, Musa, a process server, swore that a copy of the summons and a copy of the plaint was personally served by him on the defendant. In view of the conflicting averments contained in the two affidavits the High Court decided to hear oral evidence. Musa in his evidence stated that when he proceeded to the office of the defendant in Mityana he met someone, who appeared to him and whom he believed to be a clerk and on making inquiries was informed by this clerk that the manager was not in. Musa did not know either the proprietor or manager of the defendant firm. Subsequently the clerk pointed out someone as the manager and also informed Musa that the name of the manager was Sabani. Musa stated that he then handed the copy of the summons with the plaint to the manager who disputed the amount claimed and refused to accept service. He accordingly noted this fact on the reverse side of the original summons and swore an affidavit of service but did not state therein as required by O. 5, r. 15 the name and address of the person who he claimed had identified the defendant and who also witnessed the actual delivery or tender of the summons to the defendant. The defendant on the other hand, in his evidence swore that no summons was ever served on him, and denied that he had refused to endorse the original copy of the summons. Counsel for the respondent submitted that since the application was brought under O. 9, r. 24, the burden was upon the defendant to satisfy the court that the summons was not duly served on him and that the defendant had failed to discharge that burden. It was further contended that under O. 27, r. 3 (b) and r. 10 the service was effective.

Held –

- (i) the disclosure of the name and address of the person who identified and witnessed delivery or tender of the summons to the defendant at the material time is a statutory duty;
- (ii) failure to disclose the name of the clerk in the two affidavits sworn by Musa, the process server, had the effect of rendering them defective for non-compliance with the provisions of O. 5, r. 17;
- (iii) it was wrong for the Registrar to have acted on such defective affidavit of service;

- (iv) the court was satisfied that the summons was never served on Shaban, the manager and proprietor of the defendant firm.

Ex parte judgment and decree set aside. Order accordingly.

Judgment

Sir Udo Udoma CJ: This is an application by motion on notice. It is brought under O. 9, r. 24 of the Rules of this Court. The applicant is Shaban Abdulla (hereinafter to be referred to as the applicant). He is the sole proprietor and manager of the business known as “The Kampala Bus Service” with office at Mityana. The Kampala Bus Service was the defendant in the Suit No. 320 of 1966 – *M. B. Automobiles v. Kampala Bus Service* – which has given rise to this application; the Kampala Bus Service being the trade name of the applicant herein.

The application is for an order of this court to set aside the ex parte judgment and decree passed in this court against the applicant on May 19, 1966, in default of his entry of appearance and of filing a defence to the suit.

The application is opposed by the plaintiff in the suit, M.B. Automobiles (hereinafter to be referred to as the respondent) in whose favour the ex parte judgment and decree were passed.

In his affidavit in support of the application by the applicant, the grounds for the application are, inter alia, that the summons of this court purported to have been issued on May 21, 1966, in connection with the Suit No. 320 of 1966, already referred to herein, was never served on him; that he never owed the sum of Shs. 2523/35, the subject-matter of the respondent’s claim against him; and that he came to know for the first time that an action had been instituted and judgment and decrees passed against him, when on July 20, 1966, the court bailiff, attached his moveable property by the authority of a warrant issued by this court on June 1, 1966. The total amount for which execution was levied was the sum of Shs. 3269/25 as due to the respondent.

In reply to the affidavit of the applicant, there is a counter-affidavit filed by the respondent. It is sworn to by Musa Umar Amreliwalla, who described himself as a process-server. In the counter-affidavit, Musa Umar Amreliwalla swore that a copy of the summons issued from this court to which was attached a copy of the respondent’s plaint in the suit was personally served by him on the applicant on April 28, 1966 at his office in Mityana; that both the summons and the copy of the plaint were delivered to him for service by counsel for the respondent; and that after he had served the applicant he thereafter reported to counsel, and, as a result, the original copy of the summons with the endorsement thereon was filed in court together with the affidavit of service sworn by him.

In view of the violently conflicting and irreconcilable averments contained in the two affidavits, I decided, with the concurrence of both counsel, to take oral evidence for the purpose of testing the averments contained in the two affidavits. Evidence was accordingly called.

For the respondent, Musa Umar Amreliwalla gave evidence; and the copy of the original summons returned by him to the court, together with the affidavit of service attached thereto, and a notebook described by him as his personal register of service, were tendered and admitted in evidence. They were marked as Exs. B.1, B.2 and A respectively.

His evidence, in so far as it is material to the issue of service, was that he knew the office of the

Kampala Bus Service; and that it is situate in Mityana; that on receiving the summons and a copy of the complaint on April 28, 1966, from counsel for the respondent, he had proceeded to Mityana and arrived at the

office of the Kampala Bus Service at about 4 p.m.; and that in the office he met someone, who appeared to him and whom he believed to be, a clerk because he was then writing in a book. He enquired of the clerk for the manager of the business, because up till then he did not know either the proprietor or the manager of the Kampala Bus Service.

The manager was not then in the office, and, on the advice of the clerk, he tarried there until someone arrived at the office. The clerk immediately pointed out the person to him as the manager of the business, and also told him the name of the manager as Sabani. He approached the manager; and, in reply to his queries, the man admitted that he was the manager of the Kampala Bus Service and that his name was Sabani. Thereupon he introduced himself to him (the manager); and also explained that it was the clerk whom he first met on arrival at the office, who had given him to understand that he was the manager and that his name was Sabani.

He there and then delivered to the manager a copy of the summons with the plaint attached thereto. The manager, after studying the summons and the claim in the plaint, complained that the amount claimed was in dispute and far in excess of what was owed by the Kampala Bus service to the respondent.

The manager immediately returned the summons and the plaint back to him and refused to accept service. In consequence of the behaviour of the manager he, Musa Umar Amreliwalla, left with the manager where the latter was then sitting both the duplicate summons and the plaint attached thereto and invited him to endorse the reverse side of the original summons in acknowledgement of service. The manager refused to do so. He noted that fact on the reverse side of the original summons with him, and returned to Kampala with the original copy of the summons, Ex. B.1.

On May 17, 1966, he says he swore to the affidavit Ex. B.2. Later both the original copy of the summons, Ex. B.1 and the affidavit of service, Ex. B.2, were filed in court by counsel for the respondent.

Under cross-examination Musa Umar Amreliwalla said – “If I see Mr. Sabani in court I may be able to recognise him but this matter happened some six months ago and have since been serving several court processes to several people and it may not be easy for me to recognise him. I cannot recognise Sabani. I did not ask counsel for a pointer. I felt that when I got to the office, I would be able to get somebody who could point out the manager to me. I did not take down the name of the clerk, who had pointed out the manager to me that day. I cannot recognise the clerk again because it has taken a long time. I do not know the proprietor of the Kampala Bus Service.”

Then specific questions were put to him, and his answers were as hereunder set forth:

Q. –Do you know this man (Shaban Abdulla, sole proprietor and manager of the Kampala Bus Service who was all the time in court, asked to stand up, which he did, and counsel pointing at Abdulla) is the proprietor of the Kampala Bus Service?

A. –No.

Q. –I put it to you that you know this man (Shaban Abdulla still standing) and that he knows you well and you also have known him for many years.

A. –It may be that the man Shaban knows me but I do not know him.

Q. –Put-there is only one person Shaban in the Kampala Bus Service?

A. –I do not know that.

Q. –That you made a mistake that day by serving the wrong person and taking him for Shaban?

A. –The Sabani I served that day was pointed out to me by the clerk as the manager of the business.

Shaban Abdulla, the applicant herein, in his evidence denied on oath that he was ever at any time at all served with a summons in this case by Musa Umar Amreliwalla. He swore that he is the sole proprietor and manager of the business known as the Kampala Bus Service; that he does not speak nor can he write nor does he understand the English language; that he speaks and writes Swahili and his mother tongue, Nubian; that he is well-known to Musa Umar Amreliwalla and that he also knows him well as both of them usually worship together from time to time at the Kibuli and Kakasero Mosques; that he has often spoken to him; and that Musa Umar Amreliwalla knows his name as Shaban; and that they have known themselves for about twenty years.

In his address for the applicant, counsel submitted that the evidence of Musa Umar Amreliwalla be rejected as his oral testimony has done nothing to improve the affidavits sworn to by him. His oral testimony, it was contended has failed to satisfy the requirements of O. 5, r. 17, since he purported to have acted in effecting service under O. 5, r. 15. Counsel further submitted that under O. 5, r. 11 service must be personal and that the application of the applicant be granted.

For the respondent, it was submitted that, since the application is brought under O. 9, r. 24 of the Rules, the burden is upon the applicant to satisfy the court that the summons was not duly served on him; and that the applicant has failed to discharge that burden.

Counsel further contended that by the authority of O. 27, r. 3 (*b*), the service effected by Musa Umar Amreliwalla was good and effective service, the same having been effected in the office of the applicant, having regard to the fact that in terms of O. 27, r. 10 of the Rules of this court the applicant was carrying on business not in his real name.

The court was also referred to Chitaley's Commentaries, Vol. II (6th Edn.), O. 5, r. 18, para. 3, at p. 2159, and it was submitted that there is always a presumption in favour of service having been properly effected and that the burden was on the applicant to rebut that presumption.

The question for serious consideration and decision on the evidence as a whole is as to whether in fact the applicant was served with the summons in this case. And that, in the face of the extremely conflicting evidence given in these proceedings, is by no means an easy task. The evidence given in these proceedings are practically irreconcilable.

If Musa Umar Amreliwalla's evidence is accepted the fact that the summons and the plaint were merely left where the applicant was sitting because of his refusal to accept service and to endorse the original copy of the summons would not materially affect the issue of service. For service effected in that manner in the circumstances of this case would, in my view, be a perfectly good personal service under O. 5, r. 11 of the Rules of this court.

Counsel's submission that since the applicant was carrying on his business at all times material to the service of the summons in the name of the Kampala Bus Service, which is not his real name, in terms of the provisions of O. 27, r. 10 of the Rules, the service on him at his office was good service in law by the authority of O. 27, r. 3 (*b*) of the Rules of this court, requires consideration.

O. 27, r. 10 provides that:

"Any person carrying on business in the name or style other than his own name may be sued in such name and style as if it were a firm name; and, so far as the nature of the case will permit all rules under this order shall apply."

And under O. 27, r. 3 (b) the provisions are as follows:

“Where persons are sued as parties in the name of their firm, the summons shall be served –

(a) . . .

(b) at the principal place at which the partnership business is carried on within the Protectorate upon any person having at the time of service, the control or management of the partnership business there.”

There is no dispute that the applicant was and is still carrying on his business in a name, namely, Kampala Bus Service, which is not his real name; nor is there any objection to his having been sued in this suit in his business name; nor indeed does the applicant deny that at the time of the alleged service of the summons he had full control and management of his business. In my opinion the provisions of O. 27, r. 10 and r. 3 (b) present no difficulties in this matter; and, to that extent, are irrelevant and do not offer any assistance in the resolution of the issues in controversy in this application.

I accept with some qualification, having regard to the requirements of the provisions of O. 5, r. 17 of the Rules of this court, the proposition contained in O. 5, r. 18, para. 3, at p. 2159 of Chitale’s Commentaries on the Code of Civil Procedure, Vol. II, to which I was referred by counsel for the respondents, that:

“There is a presumption of service as stated in the process-server’s report, and the burden lies on the party questioning it, to show that the return is incorrect.”

Even so, as stated in the proposition itself such a presumption is rebuttable. Furthermore, in the second paragraph of the proposition referred to, it is stated that it had been held by the Calcutta High Court that the report of the serving officer that the summons was served on a person was not evidence as to service unless the serving officer was examined and the service proved.

The troublesome aspect of this matter was first noticeable in the two affidavits sworn to by Musa Umar Amreliwalla, the first of which is dated May 17, 1966, Ex. B.2, upon the contents of which judgment was passed in default of appearance in favour of the respondent. The second affidavit is dated October 14, 1966, in reply to the affidavit of the applicant in this application.

There are a number of matters in the two affidavits which deserve examination and comments. The summons for service which was delivered to Musa Umar Amreliwalla was not in the name of the applicant but in his business name of Kampala Bus Service. Since Musa Umar Amreliwalla did not know the proprietor of the business at the time the summons was given to him, one would have thought that he would have required a pointer, and such a pointer ought to be someone known to him and who also knows the proprietor or manager of the Kamapala Bus Service.

In para. (b) of the affidavit of May 17, 1966, Musa Umar Amreliwalla swore to the effect that, at the defendant’s business place, he met the clerk of the defendant company, and that the clerk advised him to wait for the manager whose name was given to him by the same clerk as Sabani; and that later Sabani, the manager, arrived at the office.

In para. 2 of the affidavit of October 14, 1966, Musa Umar Amreliwalla swore that he had entered the place after seeing the signboard. He then enquired of a clerk (or person – this was later struck off in the affidavit), sitting there about the director or manager of the company. Later a gentleman came into the office and

when he asked him his name he replied “Shaban”. Thereupon he tendered to him the original and duplicate of the summons together with a copy of the plaint; and as Shaban refused to sign it, he left the duplicate of the summons together with a copy of the plaint with him and returned with the original of the summons back to Kampala.

It is obvious that the averments in the two affidavits on material issues are at variance. In the first affidavit the name of the person said to have been served is given as Sabani, whereas in the second affidavit the person alleged to have been served is said to be Shaban. In the first affidavit, the deponent was positive that the man the deponent met on first arrival was the clerk of the defendant company, whereas in the second affidavit there is some doubt as to the status or rank of the man met in the office. He is referred to as “clerk (or person) sitting there in the office”.

Again in the first affidavit it is stated that what was tendered to the person served was the summons with a copy of plaint and annexures, which the person served admitted (and in this context “admitted” could only mean “accepted”), but that the man refused to sign the original summons, whereas in the second affidavit it was the original and duplicate of the summons, together with a copy of the plaint, which were given to the person said to have been served; and that on the refusal of the person to sign the original, the duplicate of the summons with a copy of the plaint was left with him.

In his evidence in chief in this court Musa Umar Amreliwalla swore that on entering the applicant’s office he saw a man he believed to be a clerk sitting in the office and writing in a book; that when the manager arrived, on interrogation, the manager confirmed that he was Sabani; and that when he served him with the summons the manager, after studying the summons, told him that the sum claimed in the summons was far in excess of what was owed and that the amount was in dispute; and that there and then the manager returned the summons and the plaint back to him and refused to accept service. Thereupon he took out the original copy of the summons but merely left a copy of the summons together with the plaint where the manager was sitting; and that the manager refused even to endorse the original copy of the summons.

In view of these almost irreconcilable variations in Musa Umar Amreliwalla’s evidence, it is difficult to know which of the three variations sworn to by him is the truth of what he actually did and what actually happened.

Then there is the provision of O. 5, r. 17 of the Rules of this court, which is as follows:

“The serving officer shall, in all cases in which the summons has been served under r. 15, make or annex or cause to be annexed to the original summons an affidavit of service stating the time when and the manner in which the summons was served, and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of the summons.”

Musa Umar Amreliwalla from his evidence claims to have effected the service of the summons and plaint on the applicant, who, in spite of his having accepted such service had refused, despite his entreaties, to endorse an acknowledgment of such service on the original summons. If that be true than obviously the applicant had contravened the provisions of O. 5, r. 15. It was therefore duty in cumbent on Musa Umar Amreliwalla, who in his evidence claimed to have been working as a process-server for about five years, to have disclosed in his affidavit the name and address of the person, who, he claimed had identified the applicant to him for service, and who also witnessed the actual delivery or tender of the

summons to the applicant. This he failed to do; and has even sworn in this court that he did not take down the name of the clerk at the time.

The disclosure of the name and address of the person who identified and witnessed delivery or tender of the summons to the applicant at the material time is a statutory duty. It was therefore mandatory as a matter of law for Musa Umar Amreliwalla to have done so. It is also most astonishing that he did not even take down the correct and full name of the applicant at the time of the service.

In my view, failure to have disclosed the name of the so-called clerk in the two affidavits sworn to by him in this matter has had the effect of rendering the two affidavits defective for non-compliance with the provisions of O. 5, r. 17 of the Rules of this Court. It was wrong, therefore, for the Registrar to have acted on such almost incurably defective affidavit of May 17, 1966.

I have used the expression “incurably defective” in describing the affidavit of May 17, 1966, advisedly. The affidavit of October 14, 1966, also sworn to by Musa Umar Amreliwalla never attempted to cure that defect. Indeed, in the latter the man alleged to have identified the applicant for service is described as “a clerk (or person)”, the word “person” being subsequently struck out, which, in my view, is some evidence that Musa Umar Amreliwalla was himself not sure of the status or office of the so-called identifier, if there was any.

In his testimony in this court he swore that prior to the day he went to effect service on the applicant he did not know him personally, and that he had gone to Mityana in the hope of getting somebody there to act as a pointer for him. In court here, even though the applicant was present throughout the hearing and when asked to stand up for him to see did so, Musa Umar Amreliwalla confessed that he could not recognise him as the person he had served on April 28, 1966, as Mityana, and that he does not know him as the proprietor of the Kampala Bus Service. Furthermore he said he could not again recognise even the person he described in his evidence and affidavit as a clerk in the office of the Kampala Bus Service.

I have of necessity dealt with the evidence of Musa Umar Amreliwalla at length in order to indicate the extent to which the court had to go in search of evidence in support of the allegation that the applicant had in fact been duly served, but that he had failed to enter appearance after such service. In my view, Musa Umar Amreliwalla is a very important witness in this enquiry, and may be aptly described as the king-pin in the events leading to the ex parte judgment and decree passed in favour of the respondent on May 19, 1966.

I believe I have said enough to indicate that in spite of the entry in his notebook, Ex. A, in which incidentally the name of the person served is nowhere shown, and of his endorsement on the reverse side of the original summons, Ex. B.1, I am not at all convinced that if anyone was served with the summons at all that that man was the applicant. I was not in any way favourably impressed by the evidence of Musa Umar Amreliwalla and his demeanour in the witness box. At a certain stage of his testimony he appeared to have been reading his evidence from some notes, which necessitated my ordering him to surrender a bundle of his papers to his counsel, which he did.

By the provisions of O. 9, r. 24, under which this application is brought, the burden of satisfying the court that the summons alleged to have been served had not in fact been duly served is upon the applicant.

Both in his affidavit dated July 27, 1966, and in his evidence in this court, he has sworn that no summons in this case at all was ever served on him at any time by Musa Umar Amreliwalla. He has also

denied the allegation that he had refused to endorse the original copy of the summons, a copy of which was said to have been served on him. He says he knows Musa Umar Amreliwalla as a

fellow-Muslim. I accept this evidence. The applicant was very impressive in the witness box. He gave his evidence in a straight-forward manner. I am satisfied that he spoke the truth when he testified before me that the summons in this suit was never served on him, and, according to his affidavit, that he only came to know that an action had been instituted and a judgment and decree passed against him when the court bailiff attached his moveable property.

In all the circumstances of this case, in my judgment, this application must succeed. It is granted. It is ordered that the ex parte judgment and decree passed on May 19, 1966, in the above named suit in favour of the respondent be, and it is hereby forthwith, set aside. The applicant is entitled to his costs, which I now award him. It is further ordered that the applicant be served with a copy of the summons together with the plaint within seven days of this order and that the applicant do enter appearance within fifteen days of the service of the summons and plaint aforesaid on him and thereafter file his defence to the suit within the period prescribed by the Rules of this court. Thereafter that the Registrar of this court do set down the suit for hearing at an early date. Order accordingly.

Ex parte judgment and decree set aside. Order accordingly.

For the respondent:

J. S. Shah, Kampala

For the applicant:

P. Carasco, Kampala

Francisko Sewava v Uganda [1966] 1 EA 487 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	25 October 1966
Case Number:	683/1966
Before:	Sir Udo Udoma CJ
Sourced by:	LawAfrica

[1] *Criminal law – Theft – Animus furandi – Taking of doors and iron sheets from a house – Claim by accused that house belonged to him – Conflicting claims not resolved by trial magistrate – Meaning of “claim of right” – Penal Code, s. 245 (1) and s. 252 (U.).*

Editor’s Summary

The appellant was charged in the District Court with theft of six doors and twelve iron sheets, described in the charge as the property of one A.S. and after due trial, was convicted of the offence and sentenced

to twelve months' imprisonment. A.S., who lived at Kosozi, had heard through his mother that his house in Kazo had been pulled down and that doors and iron sheets had been stolen. Neither the mother nor A.S. had gone to the site to verify the truth of the information but a police constable and A.S. interrogated one Mary who explained that she had bought two doors and twelve iron sheets from the appellant for Shs. 120/-. The appellant readily admitted having sold the doors and iron sheets to Mary. From the evidence at the trial there was some doubt as to whether A.S. and the appellant were referring to the same house and the main defence of the appellant was that the doors and iron sheets sold by him and in acknowledgment whereof he had openly given Mary a receipt was his property. The appellant appealed to the High Court on various grounds, but the substantial ground of appeal was that the trial magistrate had erred in law in failing to direct his mind to the issue of ownership of the house from which the doors and iron sheets came. It was submitted that the trial magistrate had failed to consider this claim and that this omission had occasioned a miscarriage of justice.

Held –

- (i) the appellant, having properly asserted his claim of right over not only the house from which the doors and iron sheets were extracted but also over the doors and iron sheets themselves, it was plainly the duty of the trial magistrate to resolve the two conflicting claims which he failed to do;
- (ii) it was probable that if the trial magistrate had directed his mind to the appellant's claim of right, his decision might have been different.

Appeal allowed. Conviction and sentence quashed.

Cases referred to in judgment:

- (1) *R. v. Hall* (1828), 8 Car. & F. 409.
- (2) *R. v. Wade* (1869), 11 Cox Cr. C. 549.
- (3) *R. v. Sam Clayton* (1921), 15 Cr. App. Rep. 45.
- (4) *R. v. Bernhard*, [1938] 2 K.B. 264; [1938] 2 All E.R. 140.

Judgment

Sir Udo Udoma CJ: This is an appeal against conviction and sentence. The appellant was charged with theft contrary to s. 252 of the Penal Code. He was tried, found guilty, convicted and sentenced to twelve months' imprisonment in the magistrate's court, Mengo.

There are five grounds for appeal, namely:

- 1. The trial magistrate erred in admitting evidence as to the alleged theft of doors and iron sheets of the complainant's house of the following prosecution witnesses which was hearsay: –
 - (a) The prosecution witness No. 1, the complainant, Abwasali Serembe, states that: "in June my mother sent a message to me that the house had been pulled down and all doors and twelve iron sheets taken".
 - (b) The prosecution witness No. 3, Eron Nalwadda, the mother of the complainant, states: "in June, 1966, my sister informed me that his house had been pulled down and sheets taken by people she did not know. I did not go to the police. That house is very near Nakelema".
- 2. The trial magistrate misdirected himself in finding as a fact that appellant had stolen iron sheets and doors from the complainant's house in that:
 - (a) there was no evidence direct or indirect that it was the complainant's house from which the doors and iron sheets were removed;
 - (b) that the complainant had failed to produce any evidence as to the title (if at all there was a house erected by the complainant) and that it belonged exclusively to him and not jointly with his mother. The appellant is the step-father of the complainant and stays with the complainant's mother.
- 3. The trial magistrate erred in admitting and acting on the evidence of the prosecution witness No. 5, Benjamni Sseku, to the effect that after the appellant was cautioned and arrested the appellant had admitted stealing the iron sheets and doors in that –
 - (a) there was no evidence that the said police constable was above the rank of corporal;

- (b) the alleged confession was never recorded in writing;
 - (c) the police constable did not comply with rr. 9 and 10 of the Evidence (Statements Police Officers) Rules 1961 (Legal Notice No. 227 of 1961).
- 4. The trial magistrate erred in that he failed to give benefit of doubt to the appellant in that:

- (a) the appellant had challenged the title of the complainant to the house and there was insufficient evidence as to this issue;
- (b) the alleged theft of the doors and iron sheets were never reported to the prosecution witness No. 4, Peter Sendijja, the mutongole chief at Kazo;
- (c) if at all the house belonged to the complainant there was no evidence to the fact that the appellant ever intended to deprive the complainant permanently of the value of the said doors and iron sheets.

5. Sentence is excessive.

On the facts this case presents some remarkable and unusual features, and I have been told that the most important point of law in the appeal which was raised and argued by counsel for the appellant on the question as to the import and effect of the phrase “without claim of right” contained in the definition of theft in s. 245 of the Penal Code, which is the substance of the fourth ground of appeal, has never before been argued and a decision given on it by this court. As a result there appears to be no reported case to be found on the point in the Eastern Africa Law Reports.

There is not very much in dispute between the prosecution and the appellant on the main facts of the case.

In his evidence, Abwasali Serembe (P.W.1), the complainant, testified that he had at Kazo a house with iron sheets roof and wooden doors and that he had lived therein for four years. Thereafter he sub-let the house to tenants and moved therefrom and settled at Kosozi. In June, 1966 his mother, Eron Nalwadda (P.W.3) reported to him that the house at Kazo occupied by his tenants had been pulled down and six doors and twelve iron sheets stolen from the site.

On receiving that report Abwasali Serembe (P.W.1) conducted a search for the stolen doors and iron sheets. He also reported the matter to the police. In consequence of that report Abwasali Serembe (P.W.1) and a police constable, Benjamni Sseku (P.W.5) on June 12, 1966, visited the house of Mary Nakasi (P.W.2) and there found two doors and twelve iron sheets which Abwasali Serembe (P.W.1) immediately identified as his property. On interrogation by the police, Mary Nakasi (P.W.2) explained that she had bought the two doors and twelve iron sheets from the appellant for the sum of Shs. 120/- which she had already paid to him.

At the request of the police, Mary Nakasi (P.W.2) identified the appellant as the person who had sold the doors and iron sheets to her; and the appellant there and then also admitted having sold the doors and iron sheets to her. The appellant was subsequently arrested and charged with the theft of six doors and twelve iron sheets valued at Shs. 660/- described in the charge as the property of Abwasali Serembe (P.W.1). After due trial, the appellant was convicted and sentenced as already stated.

The first ground of appeal is that the trial magistrate erred in admitting evidence described as hearsay from Abwasali Serembe (P.W.1) and Eron Nalwadda (P.W.3) the mother of Abwasali Serembe. The evidence complained of by counsel for the appellant, as concerns Abwasali Serembe (P.W.1) is reproduced in the petition of appeal and is as follows:

“In June my mother sent a message to me to say that the house had been pulled down and all doors six of them taken and twelve sheets taken.”

And the evidence of Eron Nalwadda (P.W.3) complained of as inadmissible is as set out hereunder:

“In June, 1966 my sister informed me that his house (i.e. Abwasali Serembe’s) had been pulled down and the sheets taken by people she did not know.”

In dealing with the above passages of the evidence of Abwasali Serembe (P.W.1) and Eron Nalwadda (P.W.3), counsel for the appellant contended that the appellant was prejudiced by the admission of such inadmissible evidence as the statements by Abwasali Serembe (P.W.1) and Eron Nalwadda (P.W.3) were hearsay since both of them were not speaking of their own knowledge and of what they themselves had seen personally. The evidence, it was further contended, ought not to have been admitted in the proceedings.

I must confess that on consideration of the issues in controversy in this case and the state of the evidence as a whole, I find myself unpersuaded by the contention of counsel on this point. While it may be correct that the evidence set out above attributed to Abwasali Serembe (P.W.1) and Eron Nalwadda (P.W.3), being hearsay according to the rules of evidence ought strictly not to have been admitted, I fail however to see how the appellant was prejudiced by the admission of the evidence.

In their evidence neither Abwasali Serembe (P.W.1) nor Eron Nalwadda (P.W.3) linked the appellant with either the pulling down of the house or with the theft of the doors and iron sheets. Neither of the witnesses gave evidence implicating the appellant with the theft of the doors and iron sheets. The position might have been different if, in their evidence, the two prosecution witnesses had mentioned that their information was to the effect that the doors and iron sheets were stolen by the appellant, or even that the house had been pulled down by the appellant. Such evidence of course would be inadmissible as prejudicial to the appellant, it being hearsay. And if erroneously admitted would be liable to be excluded in considering the case against the appellant.

The evidence given by Eron Nalwadda (P.W.3) on the point was that according to her sister the doors and iron sheets were taken and carried away by an unknown person; and, having regard to the admission at the trial by the appellant that he had in fact removed certain doors and iron sheets from a building pulled down by him, which he subsequently sold to Mary Nakasi (P.W.2), I am of opinion that this ground of appeal must fail. I am satisfied that in the circumstances of this case the evidence was rightly admitted by the trial magistrate.

I turn now to consider the second ground of appeal which, precisely put, is that the magistrate was wrong in law in finding as a fact that the appellant was guilty of stealing the doors and iron sheets from the complainant’s house when there was insufficient evidence as to the particular house concerned or that the house was in fact the property of Abwasali Serembe (P.W.1).

In his submission on this ground, counsel for the appellant maintained that there was insufficient evidence positively identifying the house pulled down from which the doors and iron sheets were extracted as the property of Abwasali Serembe (P.W.1) since neither Abwasali Serembe (P.W.1) nor his mother, Eron Nalwadda (P.W.3), on receiving the information that a house had been pulled down and doors and iron sheets stolen therefrom, made any effort to visit the site for the purpose of verifying the truth of the information and of ascertaining whether in fact the house involved was the property of Abwasali Serembe (P.W.1).

It was further contended by counsel that the defence of the appellant was in substance that the house from which he had removed the doors and iron sheets was his and not that of Abwasali Serembe (P.W.1).

In answer to these submissions, it was contended by the State Attorney, that there was no doubt whatsoever that the house in question was the property of

Abwasali Serembe (P.W.1) because the police constable, Benjamni Sseku (P.W.5), had visited the site and was able to confirm that six doors and twelve iron sheets had in fact been stolen from the site.

I have given considerable thought to this aspect of the case, and, subject to the observations I propose to make when considering the fourth ground of appeal, I am inclined to the view that the evidence of identification of the house from which the doors and iron sheets were alleged to have been stolen was unsatisfactory. The conduct of Abwasali Serembe (P.W.1), in this connection leaves much to be desired. It was odd and unnatural.

On the evidence, the house involved in this case was situate at Kazo while both Abwasali Serembe (P.W.1) and his mother, Eron Nalwadda (P.W.3), were at the time living at Makerere – an entirely different community and area. One would have thought that the natural reaction of Abwasali Serembe (P.W.1), on receiving the information that his house at Kazo had been pulled down and its doors and iron sheets stolen therefrom by an unknown person, would have been for him to visit Kazo for the purpose of verifying the truth of the report, and so resolve any doubt which might be entertained as to the particular house concerned, or even as to the ownership of the house.

Instead of doing that, Abwasali Serembe (P.W.1), on receiving the information from his mother, Eron Nalwadda (P.W.3), set out at once in search of the stolen doors and iron sheets. In these circumstances it is incomprehensible how Abwasali Serembe (P.W.1) was able to identify the doors and iron sheets found in the house of Mary Nakasi (P.W.2) as his property. Furthermore, it is begging the question to suggest that because constable Benjamni Sseku (P.W.5) gave evidence at the trial to the effect that, on receiving the complaint, he had visited the site of the house and noted that six doors and twelve iron sheets were missing, because there was no evidence before the court that prior to the complaint to the police in this case Benjamni Sseku (P.W.5) had known the house concerned or had ever been there.

On the unsatisfactory evidence of identity which was before the court, it may well be that the house of Abwasali Serembe (P.W.1) is at present still standing at Kazo and that the doors and iron sheets, the subject-matter of this charge, were detached from another house, not the property of Abwasali Serembe (P.W.1). That brings me to a consideration of the most important issue of law raised in this appeal, namely, the fourth ground of appeal. I propose to deal with that ground before considering, if at all, the third ground of appeal, that being the order in which the appeal was argued.

The important issue raised in the fourth ground of appeal is that the trial magistrate erred in law in failing to give the benefit of the doubt raised in the proceedings to the appellant since the appellant had challenged the title of the complainant. Abwasali Serembe (P.W.1), to the house, and there was not sufficient evidence to establish the ownership of the house in Abwasali Serembe (P.W.1).

In arguing this ground of appeal, counsel for the appellant contended that the trial magistrate was wrong in law in failing to direct his mind to the issue of ownership of the house from which the doors and iron sheets were extracted, that issue having been properly raised by the appellant. The case of the appellant, it was submitted, was that the house pulled down was his and the doors and iron sheets sold to Mary Nakasi (P.W.2) were his also; but the trial magistrate failed altogether to consider this claim to the doors and iron sheets by the appellant. It was contended that the omission by the trial magistrate to consider this aspect of the case had occasioned a miscarriage of justice.

On examination of the proceedings in this case and bearing in mind that the appellant was not defended by counsel, which unhappily cast an extra burden

on the magistrate to do his best to afford assistance on legal points to the appellant, it seems to me quite apparent that the ownership of and the title to as well as the identity of the house from which the doors and iron sheets, the subject-matter of the charge, were extracted was in dispute. That dispute appears not to have been resolved by the trial magistrate. The dispute was given prominence and aggravated by the fact that neither Abwasali Serembe (P.W.1) nor Eron Nalwadda (P.W.3) ever visited the area or site of the house claimed by Abwasali Serembe (P.W.1) to be his property. Indeed both Abwasali Serembe (P.W.1) and his mother, Eron Nalwadda (P.W.3) appear to have acted on the impulse of the moment on mere information given to them by a third party.

It is plain that on the evidence in the proceedings, there was some doubt as to whether Abwasali Serembe (P.W.1) and the appellant were speaking of the same house. The main defence of the appellant was that the doors and iron sheets sold by him and in acknowledgement whereof he had openly given Mary Nakasi (P.W.2) a receipt, were his property; detached by him from his own house, which was then in a state of dilapidation. The fact that the appellant was asserting a claim of right over the house and the goods sold was clearly brought out in the answer given by Abwasali Serembe (P.W.1) to a question put to him by the appellant.

In answer to a question put to him by the appellant as to the ownership of and the person who had built the house involved in the case and from which the doors and iron sheets were extracted, Abwasali Serembe (P.W.1) had said "I built the house and not you. You never sent me away from that house". Implicit in that answer, in my view, is the assertion by the appellant that the house in question was not the property of Abwasali Serembe (P.W.1) but his own, and that sometime ago he had had to send Abwasali Serembe (P.W.1) away from the said house.

The effect of the answer by Abwasali Serembe (P.W.1) was to put the question of the ownership of the house and consequently of the doors and iron sheets in issue, which issue in my opinion it was the duty of the trial magistrate to resolve. By the question put to Abwasali Serembe (P.W.1) and the answer referred to above it is obvious that the appellant was asserting his claim of right over the doors and iron sheets. He was in fact claiming that the house concerned was his, that the same was built by him and that the doors and iron sheets also belonged to him.

The appellant, having properly asserted his claim of right over not only the house from which the doors and iron sheets were extracted but also over the very doors and iron sheets claimed by Abwasali Serembe (P.W.1), it was plainly the duty of the magistrate to examine the two conflicting claims; and that was precisely what the trial magistrate failed to do.

The charge against the appellant was stealing; and it was laid under s. 252 of the Penal Code. The offence of stealing is defined in s. 245 (1) of the Penal Code as follows:

"245 (1) A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person other than the general or special owner thereof anything capable of being stolen, is said to steal that thing."

From the above definition of stealing, it seems obvious that a person cannot be guilty of stealing if, in taking something capable of being stolen, he does so under a claim of right however unfounded in fact such right might be. In this particular respect, it is plain that the definition of stealing in the Penal Code is not entirely dissimilar to the definition of larceny in England in the Larceny Act of 1916.

In s. 1 of the Larceny Act of England. “A person steals who . . . fraudulently and without a claim of right made in good faith takes and carries away anything capable of being stolen . . .”

Thus in both our Penal Code and the English Larceny Act, 1916, the common expressions used are “fraudulently and without a claim of right”. In other words, to commit the offence of stealing created in both Statutes, the person concerned must be shown to have taken and carried away the thing stolen fraudulently and without any claim of right.

It may also be pointed out, however, that stealing as defined in the Larceny Act, 1916, is even more stringent than stealing as defined in the Penal Code. In my view, the definition in the Penal Code of stealing is more liberal. For instance, the claim of right required in the Larceny Act, 1916, must be made in good faith; whereas in the Penal Code the good faith of the claimant would appear not to be essential.

On the other hand under the Penal Code the mere taking of a thing capable of being stolen would appear to be sufficient to constitute the offence of stealing, provided the taking is fraudulent and without any claim of right. But under the Larceny Act, the taking must be accompanied by the carrying away of the thing stolen.

For the purpose of the instant case, and as far as the phrase “without claim of right” is concerned, which is the phrase relevant to and upon which the case of the appellant was based, I consider that references to English cases in which the phrase “without a claim of right” had been considered and construed would be of some assistance in the resolution of the appellant’s defence that the doors and iron sheets involved in the charge against him were his property.

Under the common law long before the passing of the Larceny Act of 1916 in England, the attitude of the courts had always been that a claim of right by a person charged with stealing anything capable of being stolen was a good defence to such a charge.

In the old case of *R. v. Hall* (1), Hall was indicted for robbing one John Green, a gamekeeper of Lord Ducie, of three hare wires and a pheasant. It appeared that Hall had set three wires in a field belonging to Lord Ducie in one of which the pheasant was caught, and that Green the gamekeeper seeing this, took up the wires and pheasant and put them into his pocket. Hall soon afterwards came to the field. He enquired of Green whether he had taken his wires. Green answered in the affirmative and added that he also had in his possession a pheasant which was caught in one of the wires.

Hall demanded the wires and the pheasant. Green refused to surrender them to him. Hall then picked up a big stick and threatened to beat Green’s brains out of him if he did not surrender them to him. For fear that he might be beaten, Green surrendered the wires and the pheasant to Hall.

In directing the jury at the trial Vaughan, B., said:

“I shall leave it to the jury to say whether the prisoner acted on an impression that the wires and pheasant were his property; for, however liable to penalties for having them in his possession, yet, if the jury think that he took under a bona fide impression that he was only getting back the possession of his own property, there is no animus furandi, and I am of opinion that the prosecution must fail.”

The jury returned a verdict of not guilty.

In *R. v. Wade* (2), the prisoner Wade was indicted for larceny of an umbrella. Briefly the facts were that the prisoner’s wife gave Wade an umbrella to repair. On completion of the repair, Wade returned the umbrella to her. A dispute then

arose as to the bargain made between Wade and the prisoner's wife. When payment was not forthcoming Wade carried away the umbrella as a security for the amount alleged by him to be due for having repaired the umbrella.

It was held that, if the jury were of opinion that the taking by Wade was an honest assertion of his right, they were to find him not guilty, but if it was only a colourable pretence to obtain possession, then they must convict him. Wade was acquitted.

In *R. v. Sam Clayton* (3), it was laid down as a matter of law that a bona fide belief by an accused person charged with stealing that he has a legal claim to the property is a good defence and must be submitted to the jury for their consideration and decision.

R. v. Bernhard (4) was a case in which the phrase "without a claim of right made in good faith" was almost exhaustively examined and considered and carefully construed as to its meaning and effect as a defence.

There the appellant, Bernhard, was tried at the Central Criminal Court by Lord Hewart, C.J., on an indictment which charged her with demanding money with menaces of a person who was referred to during the trial as "Mr. A", with intent to steal the same contrary to s. 30 of the Larceny Act, 1916. She was convicted and sentenced to nine months' imprisonment; and the Lord Chief Justice recommended her for deportation as she was a Hungarian woman regarded as the mistress of "Mr. A".

She appealed to the Court of Criminal Appeal against her conviction on the principal ground that the learned trial Chief Justice had misdirected the jury as to the meaning of the words: "without a claim of right made in good faith". which are contained in the definition of stealing in s. 1 of the Larceny Act, 1916, and had failed to leave to the jury for their decision the question whether she, when demanding money from the prosecutor, "Mr. A", made the demand fraudulently and without a claim of right made in good faith.

It was held by the Court of Appeal that the honest belief in a right to money demanded constitutes a good defence to a charge of demanding money with menaces, with intent to steal the same, contrary to s. 30 of the Larceny Act, 1916; and that a person has a claim of right within the meaning of s. 1 of the Larceny Act, 1916, if he is only asserting what he believes to be a lawful claim, even though his claim may be unfounded in law or in fact.

In considering their judgment in the above case, the Court of Criminal Appeal, whose judgment was read by Charles, J., quoted with approval the well-known passage in Stephens' History of the Criminal Law of England, Vol. III at p. 124, which is in the following terms:

"Fraud is inconsistent with a claim of right made in good faith to do the act complained of. A man who takes possession of property which he really believes to be his own does not take it fraudulently, however unfounded his claim may be. This, if not only, is nearly the one case in which ignorance of the law affects the legal character of acts done under its influence."

To my mind the cases referred to above have thrown considerable light on the meaning and effect of the phrase "a claim of right". in the sense in which it is used in the definition of stealing. As already indicated, the defence of the appellant was an assertion of a claim of right over the doors and iron sheets was alleged to have stolen. It has been vigorously argued by counsel that the trial magistrate did not direct his mind at all to that issue. I am satisfied that the submission is well-founded and that the magistrate had failed to direct his mind to the claim of right made by the appellant in the course of the

trial of the case. I hold that the magistrate was wrong in law in not so directing his mind. It is probable that if he had done so his decision in this case might have been different.

On a consideration of the whole of the case and having regard to the principles enunciated in the cases referred to above I hold that the trial magistrate was wrong in law to have convicted the appellant. The defence of a claim of right to a charge of stealing is a good defence and the appellant ought to have been acquitted and discharged.

In view of the conclusion I have now reached on the fourth ground of appeal I think it is unnecessary for me to deal with the third ground of appeal as the view I take of the fourth ground is alone sufficient to dispose of this appeal.

The appeal succeeds. The conviction and sentence imposed on the appellant are quashed. The appellant is acquitted and discharged forthwith. Court below to carry out this order.

Appeal allowed. Conviction and sentence quashed.

For the appellant:

Jobanputra & Pandya, Kampala

M. Jobanputra

For the respondent:

The Attorney-General, Uganda

A. M. Khan (State Attorney, Uganda)

Shankerprasad M Bhatt and others v Virbai Visram and another [1966] 1 EA 495 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	7 December 1966
Case Number:	30/1966
Before:	Sir Charles Newbold P, Duffus Ag VP and Law JA
Sourced by:	LawAfrica
Appeal from:	The High Court of Kenya – Miles, J.

[1] *Costs – Retaxation – Restitution of part of costs paid when quantum of damages reduced on appeal.*

[2] *Practice – Restitution of costs by way of retaxation – Quantum of damages by the High Court reduced by about ninety per cent. on appeal – Costs taxed on the basis of High Court judgment and paid before appeal heard – Civil Procedure Act, s. 91 (K.).*

[3] *Jurisdiction – Restitution of part of costs by way of retaxation – Court of first instance empowered to order retaxation when quantum of damages reduced on appeal.*

Editor's Summary

In previous proceedings (reported in (1965) E.A. 789) the Court of Appeal reduced the amount of damages awarded to the present appellants from Shs. 98,000/- to Shs. 9,000/-. In all other respects it left the decree of the High Court unaffected save as regards a particular item relating to interest on damages awarded. Before the Court of Appeal gave its decision the plaintiffs had taxed their costs on the basis of the High Court judgment as it then stood. Following the decision of the Court of Appeal, the defendant, who was the respondent in this appeal, applied under s. 91 of the Civil Procedure Act for an order that the costs be retaxed. The judge considered that the defendant was entitled to a refund of part of the costs under Civil Procedure Act, s. 91, and he accordingly ruled that the plaintiff's costs be retaxed. On appeal against the judge's ruling it was argued that the judge had no jurisdiction to make the order for retaxation, and the fact that the Court of Appeal had maintained the original order of the High

Court in all respects except the quantum of damages showed that the Court intended to maintain the costs as they existed at the time of the appeal.

Held – the High Court had jurisdiction under s. 91 of the Civil Procedure Act to entertain the application and to make the order for retaxation, which was properly consequential on the variation of the decree of the High Court and was intended to give effect to the manifest intention of the Court of Appeal.

Appeal dismissed.

No cases referred to in judgment.

The following judgments were given.

Judgment

Sir Charles Newbold P: This appeal raises a short and, in my view, a simple question of law. This simple point was characterized by Miles, J., as novel and this description appears to be accepted by counsel. Certainly, no authority has been cited to us which bears in any way on an application of this nature under s. 91 of the Civil Procedure Act, and I have never come across, nor have I heard of, any similar application. The novelty of the application, however, does not mean that it is thereby incorrect.

The facts relating to this matter are as follows. There was an appeal against a decision of the High Court of Kenya awarding to the plaintiff, who is the appellant in this appeal, a sum of approximately Shs. 98,000/- by way of damages in respect of a trespass. This court allowed the appeal so far as it related to the quantum of damages and reduced the amount of damages awarded from approximately Shs. 98,000/- to a approximately Shs. 9,000/-. In all other respects it left the decree of the High Court unaffected save as regards a particular item relating to interest on the damages awarded. I shall refer to this later. As a result, following the judgment of this court on the original appeal, the plaintiff was entitled to recover approximately Shs. 9,000/- together with his costs. Between the date upon which the High Court gave its decision awarding approximately Shs. 98,000/- damages and the date upon which the Court of Appeal gave its decision reducing the damages to approximately Shs. 9,000/- the plaintiff had presented his bill of costs and those costs had been taxed. They had naturally been taxed upon the judgment of the High Court as it then existed. Following the decision of the Court of Appeal the defendant brought this application under s. 91 of the Civil Procedure Code asking for a retaxation of the costs already taxed.

This application was supported by an affidavit of one of the advocates in the original appeal and one of the advocates in this appeal. Counsel for the appellant has criticised the contents of this affidavit with every justification. It is unfortunately becoming quite common for things such as arguments, to be included in an affidavit which should never be included therein. I desire to stress that when an affidavit is made, particularly by an advocate of the High Court, he should bear in mind what should be included within it and he should also bear in mind the provisions of O. 18 of the Rules of the Court, particularly r. 3 of that Order. Be that as it may, the application came before Miles, J., and a preliminary objection was taken that a judge of the High Court had no jurisdiction to deal with it. This preliminary objection was over-ruled. The judge heard the application on its merits and made an order for retaxation. From that order this appeal has been brought.

Counsel for the appellant submitted in essence that Miles, J., had no jurisdiction to make this order for retaxation under s. 91 of the Civil Procedure Code. He submitted that had the Court of Appeal desired a

retaxation it would have

so specified in its order, and the fact that it had maintained the original order of the High Court in all respects other than in respect of the quantum of damages shows that this court intended to maintain the taxed costs as they existed at the time of the appeal. He submitted that this interpretation of the order of this court was reinforced by the fact that when the judgments of the Court of Appeal were delivered an application was made by counsel for the respondent asking that an amendment to the order of the Court of Appeal be made reducing the interest on the damages awarded. The appellant's counsel, as I said, referred to this specific variation of the order of the court as an indication of the will of this court that the taxed costs as they existed at that time should be maintained as there was no variation in relation to those costs. I am afraid I cannot accept counsel's argument. The two matters are quite separate. The reason for the specific variation of the interest and the order of this court that it was to be proportionately reduced was because the interest in the original High Court decree was a separate specified figure, and that separate specified figure, the precise amount was Shs. 35,156/40, had been calculated on an award of Shs. 98,295/- damages. Having regard to the terms of the appeal order, the interest would have remained at Shs. 35,156/40 although the damages had been reduced. This was obviously not in accordance with the intention of the court, and it is for that reason that a specific variation of the appeal order was made that the amount of interest specified in the High Court decree should be proportionately reduced. In making this variation this court never intended that it should be inferred therefrom that the taxed costs were necessarily to be maintained. As I said, I cannot accept the submission that the variation in the item of interest in any way whatsoever affects the interpretation of the appeal order in so far as this application is concerned. But that, of course, does not mean that this application is a proper application.

It was submitted by counsel for the appellant that the High Court had no jurisdiction to make the order for retaxation as the Court of Appeal had maintained what he described as an order for full costs, and that if it had been intended to make any variations therein then this court would have said so; as it did not there would be no jurisdiction in the High Court to do something which would be contrary to the judgment of this court. It must, I think be appreciated that the expression "full costs" can be used in two senses. First, the sense of the plaintiff being entitled to tax the full amount of the costs in the action; and, secondly, the sense of the plaintiff being entitled to the full quantum of costs which have been taxed on the basis of an entitlement to all his costs. Counsel's submissions do not distinguish between these senses and appear to merge the two quite separate meanings.

In essence, whether or not this application falls within the jurisdiction of the High Court depends upon the construction of s. 91 of the Civil Procedure Code. Subsection (1) of that section reads as follows:

"91(1) Where and in so far as a decree is varied or reversed the court of first instance shall, on the application of the party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position they would have occupied but for such decree or such part thereof as has been varied or reversed; and for this purpose the court may make any orders, including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits, which are properly consequential on such variation or reversal."

The trial judge when considering that section said in his ruling this:

"It is clear from the above that the order which the defendants now seek will not in the slightest degree amend or add to the decree on the order

of the Court of Appeal. Both these dealt merely with the incidence of the costs and not their quantum.”

These words of the trial judge were directed to that part of counsel’s argument which submitted that to grant this application and to order a retaxation would be in effect to vary the order of the Court of Appeal. This argument was repeated before us. It is true that the High Court had no power to vary the order of this court. But the order for retaxation does not do so and I think the comment of Miles, J., was entirely correct. The application did not seek to vary the order of the Appeal Court, which was that the plaintiff should have his costs. The plaintiff is still entitled to his costs. The order for retaxation does not amend the Appeal Court order in the slightest.

Later on Miles, J., said this:

“Counsel for the appellant contends that it would be necessary for the Court of Appeal to make an express order for retaxation. I do not agree. The obligation so far as restitution is concerned is placed by s. 91 on the court of first instance and it confers the widest power on that court to make ‘any orders . . . which are properly consequential or such variation or reversal.’ I am unable to see why an order for retaxation cannot come into this category. Such an order is plainly consequential upon the order of the Court of Appeal and it is necessary before any refund of costs can be made to the defendants.”

I consider that Miles, J., in that passage from his judgment correctly considered the essential point, that is, whether the order for retaxation is properly consequential upon the variation of the judgment. Now counsel has submitted, if I understood him correctly, that there has been no order varying the High Court order for taxation, and that therefore there cannot be an order for retaxation because an order for retaxation would only be “properly consequential” on a variation on the High Court order awarding the plaintiff his costs. I cannot accept that. I read the words of the section referring to a variation of the decree as meaning a variation of the decree in any respect. If the decree is varied in any respect, at least in an important respect, an order for retaxation may be “properly consequential” thereon. In my view this section gave the judge of the High Court full jurisdiction to make the order for retaxation.

That still leaves the question of whether the order for retaxation is “properly consequential” upon the variation of the decree in the circumstances of this case. The trial judge at another part of his judgment said this:

“There is no doubt but that a successful appellant who has paid costs under a decree of the court below which has been reversed is entitled to a full refund. I can see no logical difference between that case and the case where he has paid more costs than we would have done if the court below had come to the correct decision.”

Again, with respect, I entirely agree with the trial judge. I can see no reason in principle for any distinction between the case where a party is entitled to full refund and the case where he is entitled to the partial refund which may follow upon the retaxation. Counsel for the appellant in his submissions put the matter in this way. He said if the order of the Court of Appeal implied the right to retaxation then the application was otiose and that he said it was unnecessary to incur the cost of two counsel in making an application for which provision already existed; if, he went on, the Court of Appeal order did not imply retaxation then there is no jurisdiction. I do not consider that either part of that submission is correct. It is not the case of whether the Court of Appeal order

implies or does not imply retaxation. The simple position is really as put by counsel for the respondent as follows – If costs have been taxed upon one basis, that is, the basis upon an award of Shs. 98,000/- and it is found as a result of the decision of the Court of Appeal that that basis no longer exists, then is the retaxation of cost upon the new basis a proper consequence of the variation? In my view that is a question to which neither a yes nor a no answer can be given at large. It must depend upon the circumstances of each case. I should like to make it clear that the mere fact that the Court of Appeal either reduces or enhances the amount of damages or, indeed, varies any aspect of the decree does not of itself create the right to retaxation. If the party who has obtained the benefit, whether by way of a reduction or by way of an increase, consequent upon the order of the Court of Appeal considers that it is a proper case where costs which have already been taxed upon the existing basis should be retaxed, then s. 91 clearly gives jurisdiction to make such an application. It is then for the court to whom the application is made to decide on the circumstances of each case whether or not it will allow a retaxation and make the order asked for. In this case Miles, J., having considered such material as he had before him, came to the conclusion that it was a proper case to make the order. There is no ground of appeal against the exercise of that discretion. The appeal has been argued purely on the basis that he had no jurisdiction to make an order. In my view, for the reasons Miles, J., gave and which I fully endorse, and for the reasons I have sought to give, I consider that he had jurisdiction to make the order which he in fact made. In my view this appeal should be dismissed.

Duffus Ag VP: I agree with my Lord the President.

Law JA: The High Court's decree in this case was varied by this court by a reduction in the quantum of damages and in the quantum of interest which were matters specifically set out in the decree. It was not necessary for this court to deal with the quantum of costs, which was not a matter stated in the decree. In saying that the appeal was dismissed "in all other respects" this court was affirming the award of the costs of the suit to the plaintiffs, and not the quantum of those costs, which was based on the original award of damages. When the damages were reduced by some ninety per cent, that quantum became manifestly excessive and disproportionate in relation to the reduced damages. On an application made by the defendant to Miles, J., for the costs to be retaxed, the learned judge considered that the defendants were entitled, under s. 91 of the Civil Procedure Ordinance, to a refund of part of those costs, and he accordingly ordered that the plaintiff's costs be retaxed, so that the amount of the refund could be ascertained. I agree with the President that Miles, J., had jurisdiction to entertain the application and to make the order for retaxation, which in my opinion was properly consequential on the variation of the decree of the High Court by this court, and was intended to give effect to the manifest intention of this court's order on appeal. I agree that this appeal should be dismissed.

Counsel for the respondents: May I ask that the appeal be dismissed with costs. Counsel for the appellant asked that his appeal should be allowed with a certificate for two counsel. I am certainly happy to adopt that submission.

President (to counsel for the appellant): Do you resist that?

Counsel for the appellant: I would leave it to the court.

President: Although Miles, J., gave a certificate, and although counsel for the appellant asked for it and counsel for the respondents very naturally adopts the request, and in spite of the fact that this is a novel point, we consider that the position was quite clear. No authority was cited to us and we cannot feel that

this is a proper case for two counsel. Of course, the appellant is entitled to his cost, so the appeal is dismissed with costs.

Appeal dismissed.

For the appellant:

Johar & Co., Nairobi

D. N. Khanna and T. R. Johar

For the respondent:

Veljee Devshi & Bakrania, Nairobi

Satish Gautama and Veljee Devshi Shah

Uganda Credit and Savings Bank v Eriyazali Senkuba
[1966] 1 EA 500 (CAK)

Division:	Court of Appeal at Kampala
Date of judgment:	4 October 1966
Case Number:	24/1966
Before:	Sir Charles Newbold P, Spry and Law JJA
Sourced by:	LawAfrica
Appeal from:	The High Court of Uganda – Bennett, J.

[1] Mortgage – Statutory power of sale – Statutory notice required to be served on mortgagor demanding payment before sale – Notice sent by registered post but returned unclaimed – Property sold – Whether notice served in accordance with the requirements of Registration of Titles Act, s. 210a (U.).

Editor's Summary

The respondent who had mortgaged certain land to the appellant Bank to secure a loan defaulted in repaying the capital sum by instalments. The appellant, as required by s. 115 of the Registration of Titles Act, sent a notice by registered post demanding payment of the amount due. The notice never reached the respondent and was returned unclaimed to the appellant. The appellant in purported exercise of its powers under s. 117 of the Act, caused the mortgaged land to be sold by public auction and the transfer in favour of the purchaser was registered. Subsequently the respondent sued the appellant alleging that the sale was wrongful in that there had been a failure to serve the statutory notice before sale. The trial judge held that as the respondent was not served with the notice the sale was wrongful and the respondent was entitled to damages. The basis of the judge's decision was that s. 210a of the Act, which provides for service by post, should be read with s. 34 of the Interpretation and General Clauses

Ordinance to determine whether the notice had been validly served or not. The judge also considered that s. 210a (6) *ibid.* applied only to notices sent by the Registrar. The Interpretation and General Clauses Ordinance, which was in force when the land was sold, was repealed by the Interpretation Act, 1963.

Held –

- (i) s. 210a of the Registration of Titles Act applied to all notices served under that Act, not merely to notices served by the Registrar;
- (ii) the relevant statutory provision for consideration, to determine whether the notice was validly served or not, was s. 6 of the Interpretation Act 1963 and not s. 34 of the Interpretation and General Clauses Ordinance;
- (iii) the general provisions of service by post in s. 6 of the Interpretation Act 1963 were not applicable because s. 210a of the Registration of Titles Act provided a code in relation to the service of notices required to be served under the Act and that code included specific provision where a letter sent by post is returned by the post office;

- (iv) by virtue of s. 210a (6) of the Registration of Titles Act, a person who has attempted to effect service by post and whose letter has been returned undelivered, cannot rely on that posting as constituting service but must either effect personal service or apply to the registrar for directions;
- (v) as no further action was taken under s. 210a (6) after the return of the notice by the post office the notice was never served as required by s. 115 of the Registration of Titles Act and the power of sale never arose and the sale that was effected was unlawful.

Appeal dismissed.

Cases referred to in judgment:

- (1) *Municipality of Mombasa v. Nyali Ltd.*, [1963] E.A. 371 (C.A.).
- (2) *Moody v. Godstone Rural District Council*, [1966] 2 All E.R. 696.
- (3) *R. v. London Quarter Sessions*, [1956] 1 All E.R. 670.

The following judgments were read:

Judgment

Spry JA: The respondent mortgaged certain Mailo land to the appellant (to which I shall refer as “the Bank”) to secure the sum of Shs. 2,500/- and interest, the mortgage providing for repayment of the capital sum by instalments. He defaulted in making the contractual payments, whereupon the Bank caused a notice under s. 115 of the Registration of Titles Act (Cap. 205) (to which I shall refer as “the Act”) to be sent to him by registered post at the address appearing in the register book. The notice was posted on August 22, 1962, and was returned unclaimed to the Bank on October 3, 1962. On November 17, 1962, the Bank in purported exercise of its powers under s. 117 of the Act, caused the mortgaged land to be sold by public auction and in due course a transfer in favour of the purchaser was registered. Subsequently the respondent sued the Bank in the High Court, alleging that the sale was in breach of a contractual arrangement between the Bank and himself and was wrongful in that there had been a failure to serve the statutory notice before sale, and he claimed damages.

At the trial, it was agreed that the issue as to liability should be decided first, leaving the quantum of damages to be determined later if the respondent were successful. On the issue as to liability, the learned judge rejected the respondent’s claim that the sale had been in breach of contractual arrangement and there has been no appeal against that decision. He decided, however, on the second question, that the respondent had not been served with a statutory notice and that consequently the sale was wrongful and the respondent was entitled to damages. A preliminary decree was issued and it is against that decree that the Bank now appeals.

The basis of the learned judge’s decision was that s. 210a of the Act, which provides for service of notices by post, should be read with s. 34 of the Interpretation and General Clauses Ordinance (Cap. 1 of the 1951 Edition), now replaced by s. 6 of the Interpretation Act (Cap. 16). Section 210a, so far as it is relevant to this appeal, reads as follows:

“210A *Service of notices.* – (1) Any notice under the provisions of this Act may be served or given by letter posted to the person concerned at his address for service or, if he has no address for service within the meaning of this section, at his last known place of abode.

(2) Any address of a person as entered in the Register Book may be used as his address for service.

...

- (6) When a notice is sent by letter posted to any person at his address for service and the letter is returned by the post office the Registrar may if in the circumstances and having regard to the provisions of this Act he thinks fit –
- (a) direct any further notice to be given; or
 - (b) direct substituted service; or
 - (c) proceed without notice.”

This provision, which is wholly procedural, came into force on August 9, 1962, that is, after the date of the mortgage but before the purported service of the notice. Section 34 of the Interpretation and General Clauses Ordinance reads as follows:

- “34. *Meaning of service by post.* – Where any law authorises or requires any document to be served by post, whether the expression ‘serve’ or the expression ‘give’ or ‘send’ or any other expression is used, then, unless the contrary intention appears, the service shall be deemed to be effected by properly addressing, prepaying and posting, by registered post, a letter containing the document, and, unless the contrary be proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.”

The learned judge commented as follows on s. 34:

- “... It will be observed that the presumption of service which arises from the act of posting a document by registered post is capable of being rebutted. That is plain from the words ‘unless the contrary is proved’. In the instant case the presumption has been rebutted since it is common ground that the statutory notice and the letter accompanying it were returned by the Post Office.”

He considered the effect of sub-s. (6) of s. 210a and said that he was inclined to agree with counsel for the respondent that the subsection applies only to notices sent by the Registrar. He went on:

- “... If, however, the sub-section is construed as applying to all notices, by whomsoever sent, it would appear that the sender can only proceed without notice if the Registrar dispenses with it. It has not been pleaded or proved that the Registrar authorised the defendant to sell without giving the statutory notice. Thus sub-s. (6) does not assist the defendant.”

He concluded by saying that he regarded s. 210a (1) as an enabling provision, providing a substitute for personal service, and he considered that the alternative method of service having failed, the Bank should have taken steps to effect personal service.

Counsel for the Bank, submitted that the learned trial judge had fallen into error when he said that “the presumption of service which arises from the act of posting a document by registered post is capable of being rebutted”. In his submission, s. 34 falls into two parts, the first provides that posting shall be deemed to constitute service, and this is not capable of being rebutted, while the second relates to the notional time when service is to be deemed to be effected, and here the statutory presumption is capable of being rebutted; it was, therefore, not open to the trial judge to hold that there had been no service.

Counsel for the respondent submitted that s. 34 is expressed only to apply “unless the contrary intention appears” and he argued that sub-s. (6) of s. 210a shows a contrary intention. Whatever the true interpretation of s. 34, the learned judge was, according to this argument, wrong in basing his decision on it. This

submission amounts to a contention that the judgment should be affirmed on a ground other than that relied on by the trial court and should, therefore, have formed the subject of a cross-appeal. However, we thought fit to exercise our discretion and hear the argument.

We are, in fact, concerned with the Interpretation Act, which came into force on July 19, 1963, not with the Interpretation and General Clauses Ordinance, and it may be noted that s. 6, which is substantially similar to s. 34 of the Ordinance, does not contain the words “unless the contrary intention appears”. This does not, however, affect counsel for the respondent’s argument, since s. 2 (2) of the Interpretation Act provides that

“Where . . . there is something in the subject or context inconsistent with the application of this Act or any provision thereof, this Act or that provision thereof, as the case may be, shall not apply.”

It seems to me that there is merit in this submission. I should, perhaps, begin by saying that I can see no reason to think that sub-s. (6) of s. 210a applies only to notices served by the registrar. If s. 210a is looked at as a whole, there seems no reason to limit the application of sub-s. (1), which refers to “any notice”, and indeed throughout these proceedings it seems to have been accepted by everyone that sub-s. (1) applies to notices under s. 115. If sub-s. (1) applies to all notices to be served under the Act, I see no reason why sub-s. (6) should not have a similar application. It is true that para. (c) can only apply in relation to notices served by the registrar, or possibly to notices, if there are any such, where the action directly consequent on service is to be taken by the registrar, but that is not true of paras. (a) and (b). Indeed the wording of para. (a), which empowers the registrar to direct the giving of a further notice, suggests that it is not intended to relate to notices given by the registrar, since the sections relating to such notices all refer to the registrar giving or serving notice, not to his directing the giving or service of notice. In my view, sub-s. (6) enables a person who has attempted to effect service by post and whose letter has been returned by the post office, and who is unable or unwilling to effect personal service, to apply to the registrar for directions, whereupon the registrar may direct the sending of a further notice or some form of substituted service.

If I am correct so far, it follows, in my opinion, that sub-s. (6) of s. 210a and s. 6 of the Interpretation Act are incompatible, because it seems to me implicit in the former that a person who has attempted to effect service by post and whose letter has been returned by the post office cannot rely on that posting as constituting service but must take some further action to that end. If the two provisions are incompatible, then clearly s. 6 cannot be invoked in the present proceedings.

For these reasons, I think it is unnecessary, in relation to this appeal, to consider the meaning of s. 6 or to consider whether, assuming counsel for the appellant’s submission to be correct, and there is English authority to support it, it would have availed him, since he would have had to show that the sale took place a month after the service of the notice, which would, it would seem, have brought into operation the second part of the section.

Counsel for the appellant, in reply, submitted that if the matter were governed by s. 210a (6), the sale was still proper, because the registrar had proceeded “without notice” as he is empowered to do by para. (c). I am not persuaded by that argument. Under para. (c), only the Registrar had proceed without notice and he has no power to authorise anyone else so to proceed. Counsel for the appellant’s argument was that the Registrar had proceeded to register a transfer of the land, but that was not an action directly consequent on the

service of the notice nor is it the action which is complained of in these proceedings. The action which was dependant on the service of the notice and which it is alleged was wrongfully taken was the sale of the land by the Bank.

The position then, as I see it, is that the notice required by s. 115 of the Act was not in fact served: secondly, the Bank cannot rely on s. 6 of the Interpretation Act, since that section cannot apply in the present circumstances, and never sought directions from the registrar under s. 210a (6) of the Act; therefore service cannot be deemed to have been effected. It follows that the power of sale never arose and the sale that was effected was unlawful.

In my opinion, the decision of the learned judge was right, though I arrive at that conclusion for a different reason, and I would dismiss the appeal with costs.

Sir Charles Newbold P: The facts related to this appeal are set out in the judgment of Spry, J.A., and I do not consider it necessary to repeat them. Two issues arise on the appeal: first, whether the provisions of s. 6 of the Interpretation Act (Cap. 16 of the 1964 Edition and referred to hereafter as the Act) apply; and, secondly, if they do, whether on the facts the bank had acquired the power of sale under s. 117 of the Registration of Titles Act (Cap. 205 of the 1964 Edition and referred to hereafter as the Registration Act).

Dealing with the first issue, the trial judge appears to have considered s. 34 of the Interpretation and General Clauses Ordinance (Cap. 1 of the 1951 Edition) as being the statutory provision to which regard must be had to determine whether the notice had been served. With respect, I consider this to be incorrect. It is true that the Ordinance was in force when the land was sold, but it was repealed by the Interpretation Act 1963 (now the Act) and by s. 2(1)(a) it is provided that the Act applies to all Acts enacted before the commencement of the Act. It is clear therefore that the provision to which consideration should be given is not s. 34 of the Ordinance but s. 6 of the Act. This section reads as follows:

- “6. *Service by post* – Where any Act of Parliament authorises or requires any document to be served by post, the service shall be deemed to be effected by properly addressing, prepaying and posting by registered post a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of the post.

Section 2(2)(b) of the Act provides that the Act or any provision thereof shall not apply where “there is something in the subject or context inconsistent with the application of this Act or any provision thereof”. Is there anything in the Registration Act inconsistent with the application of s. 6 of the Act?

Section 210a of the Registration Act makes provision for the service of notices and, indeed, the side note of the section so states. Subsection (6) of that section reads as follows:

- “(6) When a notice is sent by letter posted to any person at his address for service and the letter is returned by the post office the Registrar may if in the circumstances and having regard to the provisions of this Act he thinks fit:
- (a) direct any further notice to be given; or
 - (b) direct substituted service; or
 - (c) proceed without notice.”

It was submitted that this subsection relates only to notices served by the registrar, but an examination of the section as a whole shows that there is no reason to place any restricted meaning upon the words of the subsection and, indeed, certain of the other subsections clearly deal with notices served by any person under the Registration Act. Section 210A of the Registration Act was inserted by the Registration of Titles (Amendment) Ordinance 1962, which came into operation on August 9, 1962, a date subsequent to the date of the mortgage, which was January 24, 1961. The section, however, clearly deals with procedural matters and as I said in *Municipality of Mombasa v. Nyali, Ltd.* (1): ‘If the legislation . . . affects procedural only, prima facie it operates retrospectively unless there is good reason to the contrary’. I see no reason why this procedural provision should not apply in relation to all instruments registered under the Registration Act with a real likelihood of consequent confusion.

On examination it will be seen that s. 210A provides a code in relation to the service of notices required to be served under the Registration Act and that code includes specific provision where a letter sent by post is returned by the post office. This specific provision is clearly inconsistent with the application of the general provision set out in s. 6 of the Act. Accordingly, the question whether there has been service of the notice is to be decided by having regard to s. 210A (6) of the Registration Act and not to s. 6 of the Act. On the facts it is clear that no action was taken under subs-s. (6) after the return of the notice by the post office. Accordingly, the notice was never served and the bank never had power under s. 117 of the Registration Act to sell the property.

As regards the second issue, even if s. 6 of the Act applies, then according to the latter part of that section service is deemed “unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of the post”. There was no evidence as to when a letter would have been delivered in the ordinary course of post and according to the agreed facts it is clear that there never was any delivery and thus no specific date when the notice could be said to have been served.

The conjoint effect of ss. 115 and 117 of the Registration Act is to give to a mortgagee a power of sale over the property of the mortgagor. The courts have always construed any such power strictly against the mortgagees. Section 117 is designed to ensure that the mortgagor would have notice of the intention to sell and time within which he could redeem his default; and that section should be construed so as to ensure that the design of the legislation is achieved. Under s. 117 of the Registration Act the power of sale arises only if the default continues “for one month after the service of such notice, or for such other period as in such mortgage is for that purpose fixed”. No period was specifically fixed in the mortgage, thus the power of sale only arises one month after the service of the notice. There must be a commencing moment from which the period of the month runs but in this case it is quite clear that there is no such commencing moment. Thus it is impossible to determine the moment of the expiration of the period of the month and it is only on such expiration that the power of sale arises. For this reason also I am satisfied that the bank had no power to sell the property. Reference was made in the course of argument to certain United Kingdom decisions. In so far as there is anything in the judgment in *Moody v. Godstone Rural District Council* (2), which is contrary to my view, and I am by no means sure that there is, then I do not consider that those judgments correctly set out the law of Uganda. I prefer what I understand to be the reasoning behind the judgments in *R. v. London Quarter Sessions* (3).

For these reasons, which are different from the reasons of the learned trial judge, I agree with the trial judge that the sale was wrongful. As my brethren are of the same view the appeal is dismissed with costs.

Law JA: I have had the advantage of reading the judgments of Newbold, P., and Spry, J.A. I agree with their conclusions, and with the order proposed.

Appeal dismissed.

For the appellant:

Wilkinson & Hunt, Kampala

R. E. Hunt

For the respondent:

Binaisa, Mboijana & Co., Kampala

R. A. Bickford-Smith

Noor Khan v Ramji Kanji & Co and Others
[1966] 1 EA 506 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	21 June 1966
Case Number:	640/1965
Before:	Farrell J
Sourced by:	LawAfrica

[1] Execution – Attachment of debts – Garnishee proceedings – Third party claiming interest in debt sought to be attached – Third party objecting to attachment of debt by way of originating summons under O. 21, r. 58 – Whether originating summons competent – Whether O. 22 constitutes a complete code in respect of attachment of debts – Civil Procedure (Revised) Rules, 1948, O. 21, r. 53 and r. 58, and O. 22.

Editor's Summary

The first defendant, as plaintiff in another action, had obtained a decree against the two second defendants who, as building contractors, were owed a substantial sum by the city council of Nairobi. As decree-holder it instituted garnishee proceedings against the city council and a garnishee order nisi was issued returnable on June 4, 1965. On June 2, 1965, the city council informed the Registrar of the High Court that it was holding a sum far in excess of the decretal amount owing by it to the second defendants and went on to mention that the present plaintiff had made a claim to an interest in the debt sought to be attached. On June 4, the hearing of the summons in the garnishee proceedings was adjourned to June 7, and on June 5, the present plaintiff by way of originating summons under O. 21, r. 58 (a) of the Civil Procedure (Revised) Rules, 1948, objected to the attachment on the ground that he had an interest in the debt due from the city council. On June 7, the adjourned summons was heard in chambers together with another similar application against the same garnishee. The present plaintiff sought to appear by an

advocate on the ground that he had an interest in the debt and although the judge was also informed of the proceedings instituted under O. 21, r. 53 he ruled that the present plaintiff's appearance under O. 22, r. 5 was premature and ordered the amount claimed to be paid into court and not to be paid out until further order. At the hearing of the summons under O. 21, r. 58, counsel for the first defendant raised two preliminary objections, namely, (*a*) that the originating summons was incompetent and (*b*) that the order made on June 7, 1965 was in effect, if not in form, an order absolute, and that the court could not proceed to adjudicate upon the present application unless and until the order absolute had been discharged.

Held –

- (i) Order 22 constituted a complete code in respect of the attachment of debts and ousted the general rules contained in O. 21 which might otherwise apply and the latter rules had no application to the attachment of debts;
- (ii) the originating summons taken out under O. 21, r. 58 was incompetent for an attachment of a debt as opposed to other property;

- (iii) by ordering that the money be paid into court the learned judge clearly intended to be guided by the result of the inquiry which was pending under O. 21;
- (iv) it was abundantly clear that the garnishee proceedings in the substantive suit had not been completed but awaited some further order.

Preliminary objection upheld. Application dismissed.

Cases referred to in judgment:

- (1) *S. M. Bashir v. United Africa Co. (Kenya) Ltd. and Others*, [1959] E.A. 864 (C.A.).
- (2) *Coast Brick & Tile Works Ltd. and Others v. Premchand Raichand Ltd. and Others*, [1964] E.A. 187 (C.A.).

Judgment

Farrell J: In these proceedings by way of originating summons under O. 21, r. 58 (a) of the Civil Procedure (Revised) Rules 1948, the plaintiff objects to the attachment of a sum of money in the hands of the city council of Nairobi said to have been levied in execution of a decree of the court in C.C. No. 486 of 1964 (hereinafter referred to as “the substantive suit”).

The circumstances are unusual. In the substantive suit the first defendant in these proceedings as plaintiff obtained a decree against the two second defendants trading as a firm under the name of Bashir Bros. The second defendants were contractors to the city council under a building contract, and a substantial sum was alleged to be due by the city council to the second defendants. The first defendant accordingly as decree-holder instituted garnishee proceedings against the city council as garnishee, and a garnishee order nisi was issued returnable on June 4, 1965. On June 2, the city council, through its advocate, informed the registrar that it was holding a sum far in excess of the decretal amount owing by it to the second defendants and went on to mention that the present plaintiff had made a claim to an interest in the debt sought to be attached.

On June 4 the summons was adjourned to June 7. In the meantime on June 5 the plaintiff had set in train the present proceedings by issuing a notice under O. 21, r. 53.

On June 7 the adjourned summons was heard in chambers together with a similar application by another decree-holder against the same garnishee. Mr. Chawla sought to appear on behalf of the present plaintiff, claiming to be a partner with the judgment-debtor and to be interested in the debt due from the city council. It appears that the learned judge was also informed of the proceedings instituted under O. 21, r. 53 of which, however, notice had not yet been served on the other parties. He thereupon ruled that counsel for the plaintiffs’ appearance under O. 22, r. 5 was premature and ordered the amount claimed to be paid into court and not paid out until further order.

That is the last relevant entry in the file of the substantive suit and the money has been paid in and remains in court.

The present proceedings in the meantime have taken the normal course in objection proceedings under O. 21, r. 53 and the following rules, and on November 3, 1965, directions were given by consent of both the plaintiff and the first defendant, the second defendants not having chosen to appear in the

proceedings.

Counsel for the first defendant has made two preliminary objections to the present application, first on the ground that the originating summons is incompetent, and secondly on the ground that the order made on June 7, 1965, was in effect, if not in form, an order absolute, and that the court cannot proceed

to adjudicate upon the present application unless and until the order absolute has been discharged by further proceedings in the substantive suit.

I can deal shortly with the second ground of objection which appears to me to be unfounded. The basis of the argument seems to lie in the submission that the money paid into court by the city council was paid to the court as agent for the first defendant as garnishor. But it seems to me quite clear that the intention of the learned judge was that the money should be paid into court pending an inquiry to determine the person properly entitled to receive it. He was aware that an inquiry was pending under O. 21 and clearly intended to be guided by the result of that inquiry. In making the order which he did, he was acting on the principle referred to in the Annual Practice, 1963 at p. 1108, in respect of the English O. 45, r. 5:

“If in fact it (Sc. a claim by a third person) comes to the master’s notice and is not unreasonable, he ought not to make the order absolute, but order the money to be paid into court to abide the result of an inquiry.”

In my view it is abundantly clear that the garnishee proceedings in the substantive suit have not yet been completed but await some further order.

The first objection involves difficult questions of construction. The substance of counsel’s argument on behalf of the first defendants is that the attachment of debts is the subject of a special procedure laid down in O. 22 which deals with what are ordinarily termed “garnishee proceedings”. Rules 5 and 6 lay down a procedure for the hearing of claims by third persons to the debt sought to be attached, and this special procedure must be followed in place of the more general procedure provided in rr. 53 to 58 of O. 21. That procedure, it is submitted, applies only to the various forms of attachment set out in the earlier rules of O. 21 and can have no reference to attachment of debts which is governed solely by its own order and rules.

Counsel for the plaintiff submits that the language of O. 21, r. 53 is wide enough to cover every form of attachment whether referred to in O. 21 or elsewhere, and that the remedies provided in O. 22, rr. 5 and 6 are concurrent with and not exclusive of the remedies provided in O. 21, r. 53 et seq. In fact, he submits the latter is a far more effective remedy since the objector is given a standing in the dispute which he does not have under O. 22, rr. 5 and 6 where the attachment proceedings are taken in a suit to which he is not a party, so that he is at the mercy of the garnishee who may or may not bring his claim to the notice of the court, and of the court which may or may not think fit to order an inquiry.

There is undoubtedly substance in counsel for the plaintiff’s criticism of the objection procedure laid down in O. 22 and of the disadvantages under which the would-be objector labours; but nevertheless the issue is to be decided not by a consideration of what the law ought to be but by the ascertainment, according to the proper principles of construction, of what the law is.

Order 21 of the Civil Procedure (Revised) Rules 1948 is based on the Indian O. 21, but departs from the Indian order in a number of particulars. The general scheme of the order is nevertheless similar, and the first fifty-seven rules of the Indian order like the first fifty-two rules of our O. 21 describe the various methods of attachment of different kinds of property. There follow in the Indian order six rules dealing with the investigation of claims and objections, corresponding to but differing from rr. 58-63 of our order. In both orders there follow provisions for the sale of property which has been attached.

There is no order in the Indian law corresponding to our O. 22, which embodies the English provisions for the attachment of debts. In India attachment of debts was dealt with in O. 21, r. 46 which so far as relevant provides as follows:

“46(1) In the case of:

- (a) a debt not secured by a negotiable instrument,
- (b) a share in the capital of a corporation,
- (c) other movable property . . .

the attachment shall be made by a written order prohibiting:

- (i) in the case of the debt, the creditor from recovering the debt and the and the debtor from making payment thereof until the further order of the court;
- (ii) in the case of the share
- (iii) in the case of other movable property . . .”

The corresponding rule in our O. 21 is r. 41, which, again omitting what is immaterial, reads as follows:

“41(1) In the case of:

- (a) a share in the capital of a corporation;
- (b) other movable property . . .

attachment shall be made by a written order prohibiting:

- (i) in the case of the share
- (ii) in the case of other movable property . . .”

From a comparison of the rules, it is manifest that the policy of the legislature in this country was to remove the attachment of debts from the ambit of O. 21 and to bring it within the separate O. 22 based on the English law.

I have not in the time available been able to trace the historic process by which the English order in relation to attachment of debts was substituted for the Indian provisions. But it is clear that in adopting the English procedure for attachment the legislature at the same time adopted the English procedure for the consideration of objections to the attachment of debts. It would have been easy, if the legislature had so wished, instead of adopting rr. 5 and 6 of the English O. 45 which are reproduced in rr. 5 and 6 of our O. 22, to provide by cross-reference that rr. 53 to 58 inclusive of O. 21 relating to objections to attachment should apply in the case of the attachment of debts as they apply in respect of other property attached in execution of a decree under O. 21. But the legislature did not choose to do so, and the intention is clear that in relation to the attachment of debts the English rules should apply in preference to the procedure laid down in O. 21. In my view, the conclusion is inescapable that rr. 53 to 58 inclusive of O. 21 have no application to the attachment of debts and it is unnecessary to consider the further argument that the reference in r. 53 to “payment out of court of the proceeds of sale of such property” seems wholly inappropriate when the property attached is a debt.

The principle that where a body of law deals specially with a particular topic the special provisions prevail over general provisions which might otherwise apply, is exemplified in the decision of the East African Court of Appeal in *S. M. Bashir v. United Africa Co. (Kenya) Ltd. and Others* (1). In that case the question was of the application of the later rules of O. 21, of the Civil Procedure Rules to sales in execution of mortgage decrees, and I need do no more than cite the holdings from the headnote ([1959] E.A. at p. 865):

“Held –

- (i) the Indian Transfer of Property Act, 1882, s. 86, s. 88 and s. 89 and the Rules of Court (Mortgage

Suits Consolidation) expressly provide for the procedure to be followed in sales in execution of mortgage decrees and these provisions prevailed over the general provisions contained in rules made under the Civil Procedure Ordinance.

- (ii) the Rules of Court (Mortgage Suits Consolidation) constitute a complete code in respect of the sale of property pursuant to mortgage decrees and oust any general rules made pursuant to the Civil Procedure Ordinance which might otherwise have been applicable and r. 98 of O. 21 of the Civil Procedure (Revised) Rules, 1948, has no application to a sale of property pursuant to mortgage decree.”

By parity of reasoning it may be said that O. 22 constitutes a complete code in respect of the attachment of debts and ousts the general rules contained in O. 21 which might otherwise apply, and the latter rules have no application to the attachment of debts.

A further illustration of the same principle is to be found in the case of *Coast Brick & Tile Works Limited and Others v. Premchand Raichand Ltd. and Others* (2) where it was held by the Court of Appeal ([1964] E.A. at p. 188):

“Section 58 of the Registration of Titles Ordinance provides a code in relation to the attestation of instruments required to be registered under the Ordinance; s. 1(2) and s. 58 *ibid.* must superseded in relation to and under the Ordinance, the requirements of s. 59 of the Indian Transfer of Property Act, 1882, that a mortgage be signed by the mortgagor and attested by at least two witnesses.”

The decision of the Court of Appeal has recently been upheld by the Privy Council, which has expressed full agreement with the reasoning of the Court of Appeal. It is, however, right to mention that in that instance there is in s. 1(2) of the Ordinance a provision for the exclusion of any inconsistent legislation.

If the above reasoning is sound the procedure adopted by the plaintiff in instituting the proceedings which led to the filing of an originating summons under O. 21, r. 58 was incompetent, and his remedy was to be sought if anywhere under rr. 5 and 6 of O. 22. On the view I have taken of the present state of the garnishee proceedings, he is not shut out from pursuing his remedy in those proceedings, nor do I think he need have any apprehension that he will not be granted a hearing pursuant to those rules. Indeed I have no doubt that it was only the fact that he had instituted proceedings under O. 21 which led the court to refuse him a hearing in the proceedings under O. 22. The matter is not before me at this stage; but before the money can be paid out it will be necessary for application to be made to the court in those proceedings, and it will be the duty of counsel for the applicant to inform the court that the third person, viz. the plaintiff in these proceedings, maintains his claim and that no inquiry into his claim is now possible except as provided by rr. 5 and 6 of O. 22.

So far as the present proceedings are concerned the preliminary objection succeeds and the application by originating summons is dismissed with costs.

Preliminary objection upheld. Application dismissed.

For the plaintiff:

Kean & Kean, Nairobi

J. A. Mackie-Robertson, Q.C., and *S. L. Chawla*

For the first defendant:

Khanna & Co., Nairobi

D. N. Khanna

The second defendant did not appear and was not represented.

Acharya travel Agencies (Uganda) Ltd v Arua Bus Syndicate Ltd
[1966] 1 EA 511 (HCU)

Division: High Court of Uganda at Kampala
Date of judgment: 4 November 1966
Case Number: 764/1964
Before: Bennett J
Sourced by: LawAfrica

[1] Agent – Disclosed principal – General authority by principal to agent to book overseas air passages on its behalf through travel agents – Air tickets procured by agent for principal from a travel agent – Agents running account with the travel agent debited with price of tickets – Principal paid the agent for tickets – Money demanded by travel agent from the principal two months later – Whether creditor represented to or induced principal to believe that agent solely liable.

Editor's Summary

The plaintiff supplied one B. with five air tickets knowing that B. was acting as agent for the defendant. B. had an account with the plaintiff and the price of these tickets was debited to this account. The defendant had no account with the plaintiff but had previously made an arrangement with B. whereby B. should procure the tickets. B. had these tickets issued by the plaintiff in October, 1963 and B. was paid by the defendant within three days. B. disappeared without paying the plaintiff. The plaintiff demanded payment in December from the defendant company which denied liability on the grounds that it was induced by the plaintiff reasonably to believe that B. had paid for the passages and that the plaintiff had elected to look to B. alone for payment.

Held –

- (i) there was nothing in the conduct of the plaintiff which could be regarded as a possible inducement to the defendant to believe that B. had paid the plaintiff for the tickets apart from a delay of some two months in applying to the defendant for payment and the delay could not be regarded as amounting to a representation that the plaintiff had been paid or that the plaintiff had abandoned its right of recourse to the defendant;
- (ii) the mere fact that the plaintiff debited B. with the price of the tickets in its ledger and sent the invoice to B. did not amount to a representation that the plaintiff looked to B. alone for payment; as the plaintiff knew that B. was acting as agent, the defendant was liable for the price of the tickets as a disclosed principal.

Judgment for the plaintiff.

Cases referred to in judgment:

- (1) *Davison v. Donaldson* (1882), 9 Q.B.D. 623.

(2) *Irvine & Co. v. Watson & Sons* (1880), 5 Q.B.D. 102.

Judgment

Bennett J: In this suit the plaintiff company claims from the defendant company Shs. 12,367/- being the price of five air tickets from Delhi to Nairobi. The defendant denies liability to the plaintiff and alleges that it procured the tickets from one K. G. Bhatt, whom it has paid in full. The short facts which have been proved or admitted are as follows: the plaintiff carries on business as a travel agent in Kampala. The defendant carries on business as a transporter of passengers and goods at Arua. The defendant was also the local agent of East African Airways at Arua and made bookings for intending passengers from Arua.

In March, 1963, one K. G. Bhatt, an insurance agent, who was also attempting to establish himself as a travel agent, came to Arua accompanied by his tout, K. F. Patel. Patel was a friend of Shukla, the clerk and accountant of the defendant and introduced Bhatt to Shukla. Shukla, acting on behalf of the defendant company, came to some arrangement with Bhatt whereby the defendant was to book overseas air passages required by its customers through Bhatt instead of dealing directly with recognised travel agents. Bhatt was not a member of the International Air Transport Association so that, seemingly, it would not have been possible for him to purchase tickets from the airline direct. He procured tickets from various recognised travel agents including the plaintiff.

In October, 1963, Shukla, acting on behalf of the defendant, bespoke five air passages from Delhi to Nairobi for the use of Singh Atwal, a director of the defendant company, and certain members of his family. The passages were booked through Bhatt. Bhatt purchased the tickets from the plaintiff with whom he had a running account and his account was debited with the price of the tickets. The tickets were sent to the passengers in Delhi on Bhatt's instructions on October 23, 1963. On October 26, 1963, the defendant paid Bhatt by cheque for the tickets.

Early in 1964, Bhatt disappeared and has not been seen or heard of since. At the time of his disappearance, Bhatt owed the plaintiff a balance of Shs. 11,599/10. In December, 1963, the plaintiff's manager had sent a telegram to the defendant demanding payment of Shs. 16,585/- being the price of various air passages. Of this amount, Shs. 12,367/- was in respect of the five air passages, whose price the plaintiff seeks to recover in this suit. On December 26, 1963, the defendant replied to that telegram by letter (Ex. P.1). To quote from the letter:

"We are having an arrangement with Mr. K. G. Bhatt of P.O. Box 19, Jinja, whom we should forward all the overseas air bookings and remit him immediately on confirmation and issuance of tickets to our clients. We have strictly adhered to our arrangement and therefore we are up to date with him so far all air bookings are concerned.

Mr. Bhatt used to allot bookings according to his choice to different agents at different times and we are aware that he had got some of our clients booked through you and therefore we would direct you to take up this matter with him."

From this letter it would seem that the defendant had given Bhatt a general authority to book overseas air passages on its behalf through any travel agents he cared to choose. This being so, Bhatt was plainly an agent of the defendant for the purpose of booking overseas air passages.

It appears from the evidence of Porecha, the plaintiff's manager, that when he supplied the five tickets to Bhatt, he knew that Bhatt was acting as agent of the defendant. Nevertheless he gave credit to Bhatt and debited his account with the price of the tickets. The defendant had no account with the plaintiff.

The law applicable to the circumstances of the instant case is to be found in art. 95 of Bowstead on Agency (12th Edn.), at p. 213, the material part of which reads:

"Where a debt or obligation has been contracted through an agent, and the principal is induced by the conduct of the creditor reasonably to believe that the agent has paid the debt or discharged the obligation, or that the creditor has elected to look to the agent alone for the payment or discharge thereof, and in consequence of such belief pays, or settles or otherwise deals to his prejudice with, the agent, the creditor is not permitted to deny, as between himself and the principal, that the debt has been paid or the obligation discharged, or that he has elected to give exclusive credit to the agent so as to discharge the principal. But mere delay by the creditor in

enforcing his claim, or in making application to the principal for payment of the debt or discharge of the obligation, is not sufficient inducement for this purpose, unless there are special circumstances rendering the delay misleading.

Except as in this article provided, a disclosed principal is not discharged, nor is the right of recourse to him affected, by the circumstance that he has paid or settled or otherwise dealt to his prejudice with the agent."

Two questions arise for consideration. First, was the defendant induced by the conduct of the plaintiff reasonably to believe that Bhatt had paid for the passages when it paid the passage money to Bhatt? Secondly, was the defendant induced by the conduct of the plaintiff to believe that the plaintiff had elected to look to Bhatt alone for payment?

As to the first question, I can find nothing in the conduct of the plaintiff which could be regarded as a possible inducement to the defendant to believe that Bhatt had paid the plaintiff for the tickets, apart from a delay of some two months in applying to the defendant for payment. In *Davison v. Donaldson* (1), the principal was held not to be discharged by a settlement with his agent, though the creditor made no application to the principal for payment until some three years after the debt was contracted. In his judgment, Jessel, M.R., said ((1882) 9 Q.B.D. at p. 628):

"All the judges agreed in laying down that, where the seller knows that there is a principal behind the person with whom he is dealing, he must be shown to have himself done something which raises an equity against him, otherwise the principal is not discharged; though I am far from saying that there may not be special cases in which mere delay on the part of the plaintiff would be held to be sufficiently misleading conduct; it may amount to a representation that he has been paid."

In the instant case, I do not regard the delay of some two months in applying to the defendant for payment, as amounting to a representation that the plaintiff had been paid. The matter is academic since the defendant paid Bhatt for the tickets three days after they were issued. It would take three days for a letter posted at Kampala to reach Arua. Unless it is held that the plaintiff should have applied to the defendant for payment by telegram within three days of the issue of the tickets, it cannot be argued that the defendant was misled by the delay of the plaintiff in applying for payment.

As to the second question, I do not consider that the mere fact that the plaintiff debited Bhatt with the price of the tickets in its Ledger and sent the invoices to him, amounted to a representation that the plaintiff looked to Bhatt alone for payment. There is no evidence that the defendant knew that the plaintiff had debited Bhatt's account with the price of the tickets and that it had sent the invoices to Bhatt, so that these two facts cannot amount to a representation that credit was given exclusively to Bhatt. As already indicated, I do not consider that, having regard to the nature of the contract, the delay in applying to the defendant for payment amounted to a representation that the debt had been paid or entitled the defendant to infer that the plaintiff had abandoned its right of recourse to the defendant.

Irvine & Co. v. Watson & Sons (2) is authority for the proposition that the fact that the contract is made with an agent and credit is given to the agent, does not preclude the creditor from having recourse to the principal provided that agent disclosed the fact that he had a principal at the time when the contract was made. In the instant case the plaintiff knew that Bhatt was acting on behalf of the defendant, and the fact that it debited Bhatt with the price of the tickets does not debar it from looking to the defendant for payment. However, that may be, the

plaintiff is not entitled to make a profit out of its misfortune. Bhatt is only indebted to the plaintiff in the sum of Shs. 11,599/10 so that part of the price of the five passages has been paid.

There will be judgment for the plaintiff for Shs. 11,599/10, interest and costs.

Judgment for the plaintiff.

For the plaintiff:

Gandesha & Co., Kampala

H. G. Gandesha

For the defendant:

Binaisa, Mborijana & Co., Kampala

C. Mboijana

Uganda v Commissioner of Prisons, Ex Parte Matovu [1966] 1 EA 514 (HCU)

Division: High Court of Uganda at Kampala
Date of judgment: 2 February 1967
Case Number: 83/1966
Before: Sir Udo Udoma CJ, Sheridan and Jeffreys Jones JJ
Sourced by: LawAfrica

(Reference from High Court for Interpretation of the Constitution of Uganda.)

[1] *Habeas corpus – Nature of writ and subjiciendum and procedure in Uganda – Necessity for an originating motion and the naming of a respondent – Relief under Criminal Procedure Code, s. 349 compared with relief under the 1966 Constitution, Art. 32.*

[2] *Constitutional law – Revolution – Validity of the 1966 Constitution of Uganda – Whether its validity a legal or political question – Judge's duty to be satisfied that Constitution legally valid.*

[3] *Constitutional law – Protection of persons detained under emergency laws – Whether measures reasonably justifiable for dealing with situation – Adequacy of statement of grounds for detention – 1966 Constitution of Uganda, Arts. 30 (5) and 31.*

[4] *Constitutional law – Whether emergency laws ultra vires the Constitution – The Emergency Powers Act 1963 – Emergency Powers (Detention) Regulations 1966.*

Editor's Summary

The applicant was arrested under the Deportation Act on May 22, 1966, and then released and detained again on July 16, 1966, under Emergency legislation which was brought into force after his first arrest. On August 11, 1966, the applicant was served in prison with a detention order and a statement specifying in general terms the grounds for his detention pursuant to art. 31(1)(a) of the Constitution of Uganda. Between February 22, and April 15, 1966, a series of events took place which resulted in a resolution of the National Assembly abolishing the 1962 Constitution of Uganda and adopting another referred to as the 1966 Constitution. Prior to this the President and Vice-President of Uganda were deprived, contrary to the 1962 Constitution, of their offices and divested of their authorities by the Prime Minister with the consent of his cabinet. After the 1966 Constitution was adopted a state of public emergency was declared and the Emergency Powers (Detention) Regulations 1966, were made. On September 9, 1966, habeas corpus proceedings were taken out in the High Court on behalf of the applicant. Despite formal defects it was possible to frame the constitutional issues to be referred to a bench of three judges of the High Court

for interpretation, namely, whether the application failed for non-compliance with art. 32 of the Constitution and the Constitutional Cases (Procedure) Act; whether the emergency powers invoked to detain the applicant were ultra vires the Constitution or were properly exercised, and whether the constitutional rights of a person detained under emergency laws as preserved by art. 31 of the Constitution, had been contravened. The court raised the question of the validity of the 1966 Constitution to which the Attorney-General objected because either it arose from a political act outside the scope of the court or it was the product of a successful revolution.

Held –

- (i) the Sovereign State of Uganda would not allow anyone to be illegally detained and has the prerogative right to enquire through its courts into anyone's loss of liberty by issuing a writ of habeas corpus, the nature and procedure of which was discussed;
- (ii) the applicant's choice of relief by writ of habeas corpus under s. 349 of the Criminal Procedure Code was competent because art. 32 (1) of the Constitution and the civil procedure related to it merely provided additional redress without prejudice to any other action that was lawfully available to him;
- (iii) the High Court in these circumstances was precluded from exercising its residuary original jurisdiction under the proviso to art. 32 (2) of the Constitution;
- (iv) this court could raise the question of the validity of the 1966 Constitution because it was relevant to the issues under consideration;
- (v) the judges were bound by the judicial oath to administer justice according to the Constitution as by law established and it was an essential part of their duty to be satisfied that the constitution was established according to law and that it was legally valid;
- (vi) any decision by the judiciary as to the legality of the government could be far reaching, disastrous and wrong because the question was a political one to be resolved by the executive and legislature which were accountable to the constituencies, but a decision on the validity of the Constitution was distinguishable and within the court's competence;
- (vii) the series of events which took place in Uganda from February 22 to April, 1966, were law creating facts appropriately described in law as a revolution; that is to say there was an abrupt political change not contemplated by the existing Constitution, that destroyed the entire legal order and was superseded by a new Constitution, namely, the 1966 Constitution, and by effective government;
- (viii) the Emergency Powers Act, 1963 and the Emergency Powers (Detention) Regulations 1966 were not ultra vires art. 30 (5) of the Constitution, nor were the measures taken pursuant to these laws unjustifiable by any appropriate subjective test;
- (ix) the detention of the applicant under the Emergency Powers (Detention) Regulations 1966, reg. 1, on an order signed by the minister was in accordance with art. 31 (1) of the Constitution except for the statement of the grounds of his detention, which was inadequate;
- (x) the failure to furnish the applicant with an adequate statement of the grounds of his detention could be cured by a direction of the High Court under art. 32 (2) of the Constitution that a proper statement be supplied;

Matter referred back for disposal in accordance with the court's interpretation of the Constitution; direction that a statement of the grounds of the detention be supplied.

Cases referred to in judgment

- (1) *Grace Stuart Ibingira and Others v. Uganda*, p. 445, ante.
- (2) *R. A. Ukejianya v. J. I. Uchendu* (1950/51), 13 W.A.C.A. 45.
- (3) *In re Parker* (1839), 5 M. & W. 32.
- (4) *Ex parte Child* (1854), 15 C.B. 238; sub nom. *Re Fitzgerald, Ex parte Child*, 2 C.L.R. 1801.
- (5) *Crowley's Case* (1818), 2 Swan. 1.
- (6) *R. v. Officer Commanding Depot Battalion R.A.S.C. Colchester, Ex parte Elliot*, [1949] 1 All E.R. 373.
- (7) *Luther v. Borden* (1849), 7 How 1.
- (8) *Baker v. Carr* (1962), 369, U.S. 186, 217.
- (9) *The State v. Dosso and Another* (1958), 2 Pakistan Supreme Ct. R. 180.
- (10) *King v. Halliday*, [1917] A.C. 260.
- (11) *Liversidge v. Anderson and Another*, [1941] 3 All E.R. 338.
- (12) *R. v. Home Secretary, Ex parte Green*, [1941] 3 All E.R. 104.
- (13) *R. v. Metropolitan Police Commissioner, Ex parte Hammond*, [1964] 2 Q.B. 385.

Judgment

Sir Udo Udoma CJ, read the following judgment of the court:

The substantial questions of law for determination by this court as to the interpretation of the Constitution of Uganda involved in this application were first raised by Michael Matovu (hereinafter to be referred to as the applicant) in his application for a writ of habeas corpus ad subjiciendum pursuant to the provisions of s. 349 of the Criminal Procedure Code.

In due compliance with the provisions of the Constitution and at the request of counsel the questions as framed by both counsel were referred to this court by Jeffreys Jones, J., sitting alone. In this court the matter has been heard by three judges in terms of s. 2 of the provisions of the Constitutional Cases (Procedure) Act (cap. 66).

Before dealing with the main questions referred to us, we think at this juncture that the original application as presented to Jeffreys Jones, J., deserves some comment, particularly as the procedure adopted by counsel in this case appears to have been followed in previous applications for the writ of habeas corpus to the High Court. Indeed, there appears to be so much confusion as regards the procedure which ought to be followed by counsel that it formed the subject of adverse comments by the Court of Appeal for Eastern Africa in a recent case – *Grace Stuart Ibingira and Others v. Uganda* (1). In that case the court not only noted that the Sovereign State of Uganda was made a respondent, but also expressed a

doubt as to its jurisdiction to entertain the appeal, which doubt we also share for two reasons not necessary to go into in this judgment.

In the instant case we would observe that the original application consisted only of two affidavits, one of which was properly sworn to by the applicant himself and the other by his counsel, which affidavit was entitled and headed in the same manner as follows:

“In the High Court of Uganda at Kampala

Miscellaneous Cause No. 83 of 1966

In the Matter of a Writ of Habeas Corpus

and

In the Matter of an application by Michael Matovu.”

For the better appreciation of the comments to be made by this court we think it necessary that the two affidavits should be and they are hereunder set forth in extenso:

“Affidavit

I, *Michael Matovu* make oath and say as follows:

1. That I am the Saza Chief Pokino, of Buddu, Buganda.
2. That on May 22, 1966, I was arrested and detained at Masindi Prison purportedly under the provisions of the Deportation Ordinance.
3. That I was subsequently transferred to Luzira Prison where I was told that I had been released on 16/7/66.
4. That immediately after my release I was re-arrested when I was still inside the Prison compound and was detained in Upper Prison, Luzira, where I am still being detained.
5. That on August 11, 1966, a detention order, under the Emergency Powers was served on me.
6. That on the same day, time and place a cyclostyled statement was served on me stating as follows:

To: Michael Matovu,
Luzira Prison.

Statement Required Under Section 31 (1) (s) of the
Constitution of Uganda

You are hereby notified that on August 10, 1966 the Minister of Internal Affairs signed an Order for your detention under Regulation 1 of the Emergency Powers (Detention) Regulations 1966.

The grounds on which you are being detained are that you are a person who has acted or is likely to act in a manner prejudicial to the public safety and the maintenance of public order.

(sgd.) W. J. Bell

SP/Cid

August 11, 1966.

Received by me on August 11, 1966, at 9.20 a.m. at Upper Prison.

(sgd.) M. Matovu

Served by me as above

Sgd. (Serving Officer)

7. That I am informed by my advocates and verily believe the same that notification of my detention was published in the Uganda Gazette as General Notice No. 832 of 1966 dated August 19, 1966.
8. That for some considerable time I was not allowed to see my advocate at all and that when he eventually came to see me in Prison on 22/8/66 I was not allowed to consult him except in the presence and hearing of Police and Prison officials.
9. That on the 26/8/66 I appeared before a tribunal consisting of Mr. Justice Sheridan as Chairman and M/s. Wanambwa and Inyoin.

10. That I am advised by my advocate and verily believe the same that my arrest and continued detention is unlawful and unconstitutional.
 11. That I therefore respectfully apply to this Honourable Court to issue forthwith a writ directing the Minister of Internal Affairs and others who may have custody and/or control of me to have my body before this Hon. Court immediately after receipt of such writ to undergo and receive all and singular such matters and things as this Hon. Court shall then and there consider of and concerning me in this behalf.
 11. That what is stated hereinbefore is true to the best of my (sic) knowledge, information and belief.
- Sworn at Luzira this August 25, 1966.

(sgd) M. Matovu

Deponent

Before me:

(sgd) A. V. Clerk

A Commissioner for Oaths, Kampala

Filed by:

Messrs. Abu Mayanja & Co.,

Advocates,

20 Kampala Road,

P.O. Box 3584

KAMPALA.”

“Additional Affidavit

I, *Abubakar Kakyma Mayanja* affirm that this is my name and handwriting and that the facts deposed to by me in this affidavit are the truth, the whole truth and nothing but the truth:

1. That I am an advocate of this Honourable Court duly instructed by the applicant to conduct these proceedings on his behalf.
2. That from the facts disclosed in his affidavit filed herein and dated 26/8/66 the following issues of law arise and will be raised on behalf of the applicant at the hearing of this application, namely:
 - (a) Article 31(1)(a) of the Constitution of Uganda 1966 was not complied with in that the applicant was not furnished with the statement required under that paragraph within the time specified therein; nor did the statement specify in detail the grounds upon which he is detained.
 - (b) Article 31(1)(b) of the Constitution was not complied with since the notification of the applicant’s detention was not published within the time specified.
 - (c) Article 31(1)(c) was not complied with in that the tribunal which reviewed the applicant’s case on 26/8/66 was not established by law, nor, apart from the chairman, could it be said to have been independent and impartial.
 - (d) Likewise Art. 31(1)(d) was not complied with in that the applicant was not allowed to consult his advocate in private, but had to do so in the presence and hearing of Government officials. He was therefore, not afforded the facilities to which that paragraph entitles him. The applicant will therefore contend that his detention is ultra vires the constitution.
3. That it will further be contended on behalf of the applicant that the Emergency Powers Act 1963 and the Regulations made thereunder,

including the Emergency Powers (Detention) Regulations 1966, are ultra vires Art. 30 (5) of the Constitution to the extent that the Act and the Regulations give the Government unfettered powers which might be wider than those envisaged by the constitution, and which may not be legally justiciable.

4. That it will also be contended that the Emergency Powers (Detention) Regulations, 1966 contained in S.I. No. 65 of 1966 are ultra vires the Emergency Powers Act 1963 in that they do not specify the area to which they apply, or they do not state that they were approved by a resolution of the National Assembly, nor is there any legal notification to that effect.
5. That it will finally be argued on behalf of the applicant that he was illegally and unlawfully brought within the emergency area and therefore the Emergency Regulations cannot apply to him.
6. That what is stated herein is true to the best of my knowledge, information and belief.

Affirmed at Kampala September 5, 1966.

(sgd.) A. Mayanja

Deponent

Before me:

(sgd.) A. V. Clerk

A Commissioner for Oaths

Filed by:

Messrs. Abu Mayanja & Co.,

Advocates,

20 Kampala Road,

P.O. Box 3584,

Kampala.

In our view the application, such as it was, as presented to the High Court in the first instance was defective. Indeed but for the fact that the application concerns the liberty of a citizen, the court would have been justified in holding that there was no application properly before it. In the first place the affidavits as intitled and headed are defective. There is no respondent named against whom the writ is sought and to whom the writ should issue. Surely a person or an official against whom an order of this court is sought ought at least to be named in, if not made a party to, the proceedings. Otherwise the court might be in difficulty when it comes to the execution of its order; and, in law a court cannot make an unenforceable order. (See *R. A. Ukejianya v. J. I. Uchendu* (2).) This would be more so in an application of this kind in which the extraordinary prerogative judicial power of the court is invoked.

The applicant would appear to have been in some doubt himself as to who was actually detaining him and against whom the writ ought to issue. For even in the first para. 11 (there being two paragraphs numbered 11 shown in the affidavit) of his affidavit, which might be regarded as containing his prayer to the court, if prayers were permissible in an affidavit, the applicant merely says "I therefore respectfully apply to this Honourable Court to issue forthwith a writ directing the Minister of Internal Affairs and others who may have custody or control of me or both to have my body before this Honourable Court Immediately after receipt of such a writ to undergo and receive all and singular such matters and things as this Honourable Court shall then and there consider of and concerning me in this behalf".

In the second place the fact that the two affidavits were not accompanied by notice of motion or a

motion paper signed by the counsel for the applicant setting out the relief sought and the grounds entitling the applicant to such a

relief was so fundamental a defect as to be almost incurable. In effect it meant that there was in fact and law no application capable of being entertained properly before the court.

As a general rule of practice, an application for a writ of habeas corpus must be made by what may be termed an “originating motion”, so termed because it originates the proceedings, supported by an affidavit sworn to by the person restrained showing that the application is made at his instance and that he is illegally restrained. Such an affidavit however may be made by some other person where the applicant is so coerced as not to be able to make one. (See *Re Parker* (3); *Ex parte Child* (4), and Short and Mellor, *The Practice on the Crown Side of the King’s Bench Division* (2nd Edn.) at p. 319.).

It would appear that because there was no motion paper filed counsel for the applicant was driven to filing in court another affidavit sworn to by him personally, in which he set out in detail the grounds of law upon which he proposed to rely in support of his application.

The affidavit sworn to by counsel is also defective. It is clearly bad in law. Again, as a general rule of practice and procedure, an affidavit for use in court, being a substitute for oral evidence, should only contain statements of facts and circumstances to which the witness deposes either of his own personal knowledge or from information which he believes to be true. Such an affidavit must not contain an extraneous matter by way of objection or prayer or legal argument or conclusion. The affidavit by counsel in this matter contravenes O. 17, r. 3 of the Rules of this Court and should have been struck out.

As was said by Lord Eldon, L.C., in *Crowley’s* case (5), quoting from Hale’s *History of the Common Law*:

“The writ of habeas corpus is a very high prerogative writ, by which the King has a right to enquire the cause for which any of his subjects are deprived of their liberty.”

And in *Cornes Crown Practice* mentioned in 2 Halsbury’s *Laws* at p. 24, footnote (e) it is declared:

“If any man be imprisoned by another a corpus causa, i.e. habeas corpus can be granted by the court (of King’s Bench) to those who imprison him for the King ought to have an account rendered to him concerning the liberty of his subjects and the restraint thereof.”

This doctrine appears to have been founded on the principle that every subject of the crown was entitled to protection exercised by the crown through the court of King’s Bench. Historically the court of King’s Bench seemed originally to have been a committee of the Curia Regis, and derived its title from the fact that the sovereign formerly sat in the court himself. The court very early acquired the character of a true court of justice. Hence it followed that whether the King was actually present or not judgment could only be given by his judges. Later the doctrine was developed that the King could not be a judge in his own cause especially with regard to prerogative writs, which were usually taken out in the name of the King.

The theory of the King’s presence was however kept up and the fiction that all proceedings in the court were before the King has produced many consequences, one of which being that all processes are usually issued in the King’s name, and orders or summonses from the court are issued in the form of a command by the King.

“ ‘The court of King’s Bench’, says Lord Coke, ‘has not only jurisdiction to correct errors in judicial proceedings but also other errors and misdemeanours extra judicial tending to the oppression of the subject. If therefore any

person is committed to prison, this court upon motion ought to grant habeas corpus: and upon return of the cause, do justice and relieve the party wronged.”

(See: The introduction to Short and Mellor, *The Practice on the Crown Side of the King’s Bench Division* (2nd Edn.).)

It is plain therefore that even at the time of Lord Coke an application for the writ of habeas corpus was always commenced in the name of the Crown on the principle that the Crown would not suffer its subjects to be illegally detained with impunity. For instance in *R. v. Officer Commanding Depot Battalion R.A.S.C. Colchester, Ex parte Elliott* (6), which was an application for the writ of habeas corpus by one Elliott against the Officer Commanding Depot Battalion R.A.S.C. Colchester, the application was headed as hereunder set forth:

“*R. v. The Officer Commanding Depot Battalion R.A.S.C. Colchester, Ex parte Elliott.*”

The application was entitled in the King’s Bench Division.

By analogy on the principles enunciated above as developed by the common law, the presumption in Uganda ought to be that the Sovereign State of Uganda would not suffer any of its citizens to be illegally detained; and therefore has the prerogative right through its courts of enquiring into the cause or causes for which such a citizen has been deprived of his liberty. On that presumption then the application in the instant case should have been commenced by motion in the name of the Sovereign State of Uganda; and, having regard to the allegations in the affidavit of the applicant, it should have been intitled and headed thus:

“In the High Court of Uganda
Holden at Kampala
In the Matter of Uganda
v.
The Commissioner of Prisons, Uganda
Ex parte Michael Matovu;”

In which event the Commissioner of Prisons would have been the respondent since the applicant was detained in Luzira Prison.

On examining the papers in this matter our first reaction was to send the case back to the judge with a direction that the matter be struck off as we were of the opinion that there was no application for a writ of habeas corpus properly before him. There was no motion in support of which the two affidavits were filed, it appearing that counsel for the applicant had erroneously treated the affidavits filed as the application. Furthermore, there was no respondent mentioned in the affidavits as headed.

On reflection, however, bearing in mind the facts that the application as presented in the first instance was not objected to by counsel who had appeared for the state; that the liberty of a citizen of Uganda was involved; and that considerable importance was attached to the questions of law under reference since they involved the interpretation of the Constitution of Uganda; we decided, in the interests of justice, to jettison formalism to the winds and overlook the several deficiencies in the application, and thereupon proceeded to the determination of the issues referred to us.

We turn now to the subject-matter of this reference and start off by summarising the events, facts and circumstances leading to and culminating in this reference.

On February 22, 1966, the then Prime Minister of Uganda issued a statement headed “Statement to the Nation by the Prime Minister”, annexure A, declaring

that in the interests of national stability and public security and tranquility he had taken over all powers of the Government of Uganda. The statement is of great importance and we therefore reproduce it hereunder. It reads:

“In the interest of national stability and public security and tranquility, I have today – February 22, 1966 – taken over all powers of the Government of Uganda.

I shall henceforth be advised by a council whose members I shall name later. I have taken this course of action independently because of the wishes of the people of this country for peace, order and prosperity.

Five former ministers have today been put under detention pending investigations into their activities.

I call upon the judges and magistrates, civil servants – both Uganda and expatriate – members of the security forces and the general public to carry on with their normal duties.

I take this opportunity to assure everybody that the whole situation is under control.”

On February 24, 1966 there followed another statement made to the nation by the then Prime Minister, annexure B, in which, among other things, the Prime Minister disclosed that he had been forced to take “certain drastic measures” because of events and “unwelcome activities of certain leading personalities”, who had plotted to overthrow the Government; that during his tour of the Northern Region of Uganda early in the month an attempt was made to overthrow the Government by the use of foreign troops; and that certain members of the Government had requested foreign missions for military assistance consisting of foreign troops and arms for the purpose of invading the country and overthrowing the Government of Uganda.

The Prime Minister then declared:

“The Constitution (of Uganda) shall be suspended temporarily with effect from 7 o’clock tonight.

In order however to provide for effective administration for the smooth running of the Government machine and also for the promotion of unity the following subjects contained in the Constitution [said the Prime Minister] shall be preserved:

- (a) The Courts, Judges and Magistrates;
- (b) The Civil Service;
- (c) The Army, Police and Prison Services;
- (d) The Rulers of Federal States and Constitutional Heads of Districts;
- (e) The District Administration and Urban Authorities;
- (f) The Schedules to the Constitution of Uganda; and
- (g) The National Assembly.”

There was to be established a council composed of ministers including the Attorney-General and certain members of the armed forces and the police. The ministerial portfolios were to function as before and certain vacancies caused by the absence of the ministers under detention were to be filled. The statement ended with an appeal to the people to remain calm and to co-operate with the security forces in the maintenance of law and order.

On February 25, 1966, the statement and declaration contained in annexure B were repeated and more elaborately spelt out in annexure C, which established a security council of which the Prime Minister was chairman. In annexure C however, which was signed by all the ministers then supporting the Prime Minister, item (f) in annexure B was omitted.

On March 2, 1966, annexure D was published. In it the Prime Minister declared that acting with the advice and consent of the cabinet:

- “(a) The executive authority of Uganda shall vest in the Prime Minister and shall be exercised by the Prime Minister acting in accordance with the advice and consent of the cabinet; and
- (b) The duties, powers and other functions that are performed or are exercisable by the President or Vice-President immediately before February 22, 1966, shall vest in the Prime Minister by and with the advice and consent of the cabinet.”

Thus by that declaration both the President and Vice-President of Uganda were not only deprived of their offices, but divested of their authorities. Immediately thereafter the President of Uganda was forcibly ejected from state house, which is the official residence of the President of Uganda.

For the proper appreciation of the state of affairs and the changes purported to have been made by the above mentioned statements and the declaration, we pause here to note that the Constitution referred to in the statement of February 24, 1966, was the Constitution of Uganda promulgated by the authority of the Uganda (Independence) Order in Council 1962, which came into force on October 9, 1962, and subsequent amendments thereto. Throughout this judgment therefore that Constitution will hereinafter be referred to as the 1962 Constitution.

In the 1962 Constitution, the offices of President and Vice-President of Uganda were created by arts. 34 and 35, the President being therein described as the Supreme Head and Commander in Chief of Uganda. The provision of art. 37 was that the Parliament of Uganda should consist of the President and the National Assembly, while arts. 61, 62, 64 and 65 vested the President with the executive authority of Uganda with power to appoint a Prime Minister; and thereafter, acting in accordance with the advice of the Prime Minister, to appoint other Ministers, including the Attorney General; and to assign to such Ministers responsibilities for the business of Government, including the management of Departments.

In art. 36 it was provided that the President and the Vice-President might at any time be removed from office by a resolution of the National Assembly, moved either:

- “(a) by the Prime Minister; or
- (b) by a member of the Assembly other than the Prime Minister who satisfies the Speaker that not less than one half of all the members of the Assembly have signified in writing the intention to vote in support of the resolution, and which is supported by the votes of not less than two-thirds of all the members of the Assembly.”

In other words, by this article, the President and Vice-President could not be removed from their office except by a resolution passed by the votes of not less than two-thirds of all the members of the National Assembly.

To return to the chronology of events. On March 5, 1966, the Prime Minister issued another statement, annexure E. The statement was in reply to a press report purported to have been published by Sir Edward Mutesa who, until February 22, 1966, when the Prime Minister seized all the power of Government, was the President and Supreme Head and Commander in Chief of Uganda. In his statement, the Prime Minister pointed out that in the press statement made by Sir Edward Mutesa the latter had openly admitted that unknown to him as Prime Minister or any of his Cabinet Ministers, he, Sir Edward, had made

request for military assistance from foreign countries as a precautionary measure, because there were then rumours current in the country that troops were being trained somewhere in the country for the purpose of overthrowing the Constitution.

Then on April 15, 1966, at an emergency meeting of the National Assembly, the following resolution, annexure F at p. 20, which was proposed by the Prime Minister was passed:

“Whereas in the interest of national stability, public security and tranquility, the Prime Minister, on February 22, 1966, suspended the then Constitution of Uganda and took over all the powers of the Government as a temporary measure.

And whereas the Government, on February 24, 1966, approved the action taken by the Prime Minister in order to ensure a speedy return to the normality which existed before the occurrence of the events which led to the suspension of the Constitution, and

Whereas it is desirable, in order to return to the state of normality that a Constitution should be adopted.

Now, therefore, we the people of Uganda hereby assembled in the name of Uganda do resolve and it is hereby resolved that the Constitution which came into being on October 9, 1962, be abolished, and it is hereby abolished accordingly, and the Constitution now laid before us be adopted this day of April 15, 1966, as the Constitution of Uganda until such time as the Constituent Assembly established by Parliament enacts a Constitution in place of this Constitution.”

On the adoption of the Constitution of April 15, 1966 (hereinafter to be referred to as the 1966 Constitution) oaths under the new Constitution were administered to the Prime Minister, who thereupon by virtue of provisions of art. 36 (6) of the new Constitution became automatically by operation of law elected President and the Head of State and Commander in Chief of the Sovereign State of Uganda. Thereafter oaths were administered to members of the National Assembly, both Government supporters and Opposition and other Officials of State. Members of the National Assembly were only able to take their seats in the State Assembly after the taking of the oath under the new Constitution.

On May 22, 1966, the applicant was arrested and detained at Masindi Prison under the Deportation Act (Cap. 308). He was subsequently transferred to Luzira Prison within the Kingdom of Buganda.

On May 23, 1966, by proclamation, Legal Notice No. 4 of 1966, a state of public emergency was declared to exist in Buganda Kingdom; and on May 25, 1966 by a resolution of the National Assembly the proclamation was affirmed and Emergency Powers Act (Cap. 307), and regulations made thereunder including the Emergency Powers (Detention) Regulations 1966, Statutory Instrument No. 65 of 1966 were brought into force and in full operation.

On July 16, 1966, the applicant was released and ordered to go. Soon thereafter at about 12.45 p.m. as the applicant stepped out of prison, he was rearrested and detained again in Luzira Prison.

Then on August 10, 1966, acting under the authority vested in him by reg. 1 of the Emergency Powers (Detention) Regulations 1966, the Minister of Internal Affairs ordered the detention of the applicant. That Order, together with the statements purported to have been made in due compliance with art. 31(1)(a) of the Constitution of Uganda was served on the applicant in prison on August 11, 1966.

On August 19, 1966, the detention of the applicant was gazetted in General Notice No. 832 of 1966. On August 26, 1966, the applicant appeared for the review of his case before a tribunal, the establishment of which was in terms of the provisions of art. 31(1)(a) of the Constitution gazetted as General Notice No. 776 of 1966 of August 5, 1966.

On September 6, 1966, the applicant filed what purported to be an application for a writ of habeas corpus. On September 14, 1966, the application came before Jeffreys Jones, J., who, as already stated, in view of the important questions of law involved as to the interpretation of the Constitution of Uganda raised in the application, referred the questions to this court; and directed that both counsel should frame the issues of law in controversy for determination by this court.

The issues as framed which came before this court fell under three heads and are as follows:

- “1. Whether, having regard to the procedure laid down in art. 32 of the Constitution and in the Constitutional Cases (Procedure) Act (cap. 66) and in the rules made thereunder the procedure adopted in the present application is the proper procedure.
2. Whether the Emergency Powers Act 1963, and the Emergency Powers (Detention) Regulations 1966, or any material parts thereof are ultra vires the Constitution to the extent that the Act and the regulations enable the President to take measures or authorise the taking of measures that may not be reasonably justifiable for the purpose of dealing with the situation that existed during the period when a declaration of a state of public emergency is in force within the meaning of art. 30 (5) of the Constitution – and
3. Whether any of the provisions of art. 31 (1) of the Constitution have been contravened in relation to the applicant having regard to the affidavits filed herein by and on behalf of the applicant on the one hand, and on behalf of the State on the other hand.”

In support of the first issue, the learned Attorney-General submitted for the respondent that it was contrary to the Constitution that the applicant should have proceeded by way of habeas corpus since art. 32 (1) and (2) of the Constitution has prescribed the procedure to be followed whenever there was an allegation that the provisions of arts. 17 to 29 including clause (1) of art. 31 have been contravened; that the writ of habeas corpus is a statutory relief created in s. 349 of the Criminal Procedure Code and therefore inferior to the procedure and relief provided by art. 32 of the Constitution, the Constitution being the supreme law of the land; that by bringing his application by way of habeas corpus for the purpose of having the Constitution interpreted, the applicant was indirectly preparing the way to take the matter to the Court of Appeal by the back door, whereas by virtue of the provisions of art. 96 (b), the Court of Appeal has no jurisdiction to entertain appeals on the question of the interpretation of the Constitution; and that the proper procedure for raising such constitutional matters as were involved in this case was to follow the procedure set out in the Civil Procedure (Fundamental Rights and Freedoms) Rules 1963, Legal Notice No. 13 of 1963, made under the provisions of s. 3 of the Constitutional Cases (Procedure) Act.

The relevant provisions of art. 32 relied upon by the learned Attorney-General are in the following terms:

- “32(1) Subject to the provisions of cl. (5) of this article, if any person alleges that any of the provisions of arts. 17 to 29 inclusive or cl. (1) of

art. 31 of this Constitution has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter that is lawfully available, that person may apply to the High Court for redress.

- (2) The High Court shall have original jurisdiction to hear and determine any application made by any person in pursuance of cl. (1) of this Article, and may make such orders, issue such writs and given such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of the said arts. 17 to 29 inclusive, or cl. (1) of art. 31 of this Constitution, to the protection of which the person concerned is entitled;

Provided that the High Court shall not exercise its powers under this clause if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any law.”

While it is true that under art. 96 (b) of the Constitution, there is no right of appeal from the decision of this court to the Court of Appeal on any question as to the interpretation of the Constitution, yet, it is difficult to see how in an application for a writ of habeas corpus in which the main complaint by the applicant is that his detention is illegal for noncompliance with regulations made under an Act of Parliament, and that even the Act of Parliament relied upon by the executive in detaining him is ultra vires the Constitution, the question as to the interpretation of the Constitution could be avoided even if the application was brought under art. 32 (1) and (2) of the Constitution and in accordance with the procedure prescribed by r. 7 of Legal Notice No. 13 of 1963 – The Procedure (Fundamental Rights and Freedoms) Rules 1963.

In any event, under the proviso to art. 32 (2) of the Constitution, the High Court is precluded from exercising its powers under the clause if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any law. We are of opinion that an application for a writ of habeas corpus, which is a statutory remedy created by the law of this country, is one of the means of redress open to the applicant.

We have, however, more than once pointed out that this court was sitting not as a court to hear an application for the writ of habeas corpus, but as a constitutional court concerned with the interpretation of the provisions of the Constitution in the light of the issues referred to us in terms of the provisions of art. 95 of the Constitution. Our duty is therefore clear. It is to interpret the Constitution and thereafter direct that the matter concerned, in so far as it relates to the question of interpretation of the Constitution, be disposed of in accordance with our decision.

It is our view that we are not sitting here as a Court of Appeal, and therefore the question as to whether there is a right of appeal to the Court of Appeal is a matter within the competence of that court. On the other hand, if there is any conflict between the provisions of the Constitution; or if a particular provision of the Constitution produces results never intended that certainly is not a matter for this court. The learned Attorney General is well aware of the proper quarters to which reference should be made in that regard.

Having given consideration to the submissions of the learned Attorney-General in respect to the procedure which has been followed in the instant case, we are of opinion that the submissions are unsound. The objection must be and it is over-ruled. It is clear that the provisions of art. 32 (1) expressly reserve to any person to whom they apply additional right to redress in the High Court. The provisions of art. 32 are *without prejudice to any other action with respect to the same matter that is lawfully available to the persons concerned.*

We hold that this application and reference are competent. (See: Unreported decision of this court in Miscellaneous Criminal Applications Nos. 9 and 31/35 of 1966, *Re Emmanuel Sajjalyabene Lumu and Four Others*.) Our answer therefore to the first question is in the affirmative.

In the course of his submissions on the second issue, to which we shall later revert, as to “whether the Emergency Powers Act 1963, and the Emergency Powers (Detention) Regulations 1966, or any material parts thereof are ultra vires the Constitution to the extent that the Act and the Regulations enable the President to take measures that may not be reasonably justifiable for the purpose of dealing with the situation that exists during the period when a declaration of a state of public emergency is in force within the meaning of art. 30 (5) of the Constitution”, reference was made to the affidavit filed in these proceedings by the learned Solicitor-General dated September 10, 1966.

In para. 8 of the said affidavit, the learned Solicitor-General swore: “That the Constitution of Uganda, as by law established, is the supreme law of the land”. As there were then before the court two Constitutions, one being the 1962 Independence Constitution, while the other was the 1966 Constitution promulgated as already stated in April, 1966, the court ex proprio motu raised the question of the validity of the 1966 Constitution.

When questioned by the court, counsel for the applicant observed that, although as a realist, he himself had accepted the Constitution as valid he was in some doubt as to its real validity in law. On the other hand the learned Attorney-General vigorously maintained that the 1966 Constitution was legally valid, it having been properly and legally promulgated by the representatives of the people of Uganda.

The court thereupon felt compelled to enquire into the legal validity of the 1966 Constitution and consequently called upon the learned Attorney-General to satisfy it that the 1966 Constitution (hereinafter to be referred to as the Constitution) was valid in law.

The learned Attorney-General then submitted that, although he would concede to the court as a Court of Record the right to raise any question relevant to the issues in controversy between the parties, he felt that in the matter of the kind under enquiry, the court was not competent to enquire into the validity of the Constitution on three grounds, namely:

1. That since the issues framed and referred to the court and the application and the affidavits filed by the applicant were based on the validity of the Constitution, it was not competent for the court to go behind those issues and the application, the validity of the Constitution not being one such issue;
 2. That as judges of the High Court of Uganda, the court was precluded from enquiring into the legal validity of the Constitution by reason of their judicial oath; and
 3. That the court had no jurisdiction to enquire into the validity of the Constitution because the making of a constitution is a political act and outside the scope of the functions of the court.
- 3.(a) Alternatively, counsel also submitted that the court was bound to declare the Constitution valid, if it should undertake to enquire into its validity, because the Constitution was the product of a successful revolution.

We propose to deal with these objections seriatim. We are of opinion that the first of these objections is based on a complete misconception of the functions of this court as well as of the relevance of the objection itself. It is the duty of any Court of competent jurisdiction, in order to do justice according to law and to satisfy its conscience, to raise all such questions of law which it considers

relevant for the proper determination of the questions in controversy between parties; and it is the court alone, which is competent to determine what is and what is not relevant to the issues under consideration. It seems to us that the learned Attorney-General appeared to have confused the position and authority of this court to raise any question it considers relevant in this matter with the position of a party in a proceeding to raise a question, in the course of his submissions, which did not originally form part of his case. The objection would have been perfectly sound if the question of the validity of the Constitution had been raised by the counsel for the applicant; for then, he would be met by the objection that he was estopped in pais as such a question did not form part of his case, especially as he had admitted in his application by implication that the Constitution was valid in law. We are therefore of the view that this objection is unsound and must be, and we accordingly over-ruled it.'

As regards the second objection that by reason of the judicial oath this court is precluded from questioning the validity of the Constitution, the learned Attorney-General referred the court to s. 93 of the 1962 Constitution, in which it was provided:

"That a judge shall not enter upon the duties of his office unless he has taken and subscribed the oath of allegiance and such oath for the due execution of his office as may be prescribed by Parliament;"

and also to s. 5 of the Uganda (Independence) Order in Council, the provisions of which are as follows:

"5(1) Where any office has been established by or under the provisions revoked by s. 2 of this Order and the Constitution of Uganda establishes a similar or an equivalent office, any person who immediately before the commencement of this Order holds or is acting in the former office shall, so far as is consistent with the provisions of this Order, be deemed to have been appointed as from the commencement of this order to hold or to act in the latter office in accordance with the provisions of this Order and to have taken any necessary oath under this Order."

Section 5 of the Oaths Act (Cap. 52) similarly exempts judges from again physically taking both the oath of allegiance and the judicial oath.

The learned Attorney-General then submitted that on February 22, 1966, when the Prime Minister seized all the powers of Government thereby deposing, as it were, the then President and Vice-President in the circumstances already indicated in this judgment, he had made a special appeal to the Judges and Magistrates to carry on with their normal duties as the whole situation was then under control; and that when on February 24, 1966, the 1962 Constitution was suspended, the Courts, Judges and Magistrates were preserved. Counsel contended that it was in response to the appeal of the Prime Minister that judges of the High Court of Uganda had continued in their posts.

The learned Attorney-General further drew the attention of the court to art. 127 (1) of the 1966 Constitution, which reads as follows:

"127 (1) Subject to the provisions of this Article every person who immediately before the commencement of this Constitution held or was acting in any office established by or in pursuance of the Constitution as then in force shall, so far as is consistent with the provisions of this Constitution, be deemed to have been appointed as from the commencement of this Constitution to hold or to act in the equivalent office under this Constitution and to have complied with any requirement of this Constitution or of any other law to take and subscribe any oath on appointment or election to that office."

Counsel then submitted that in virtue of the above provisions, all judges are deemed to have been reappointed and to have taken and subscribed the oath on the coming into operation of the 1966 Constitution; and therefore it was not competent for the court to enquire into the validity of the Constitution under which they were appointed, as it was its duty to preserve, protect and defend that Constitution in terms of the oath of allegiance under the Oaths Act (Cap. 52).

These certainly are weighty and formidable submissions brilliantly and eloquently presented. They have a great force behind them. They appear at first sight almost unassailable and unanswerable. On a closer examination, however, of the two oaths, namely the oath of allegiance and the judicial oath, it seems clear that the submissions over-simplify the position. In his submissions, the learned Attorney-General would appear to have overlooked the judicial oath itself and to have over-emphasised the oath of allegiance. To be able to appreciate the subtle difference between the two oaths, it is necessary, we think, that both be and are hereunder set forth as they appear in the First Schedule to the Oaths Act (Cap. 52):

“1. Oath Of Allegiance

I swear that I will be faithful, and bear true allegiance to the Sovereign State of Uganda and that I will preserve, protect and defend the Constitution of Uganda. So help me God.”

And

“2. Judicial Oath

I swear that I will well and truly exercise the judicial functions entrusted to me and will do right to all manner of people in accordance with the Constitution of the Sovereign State of Uganda as by law established and in accordance with the laws and usage of the Sovereign State of Uganda without fear or favour, affection or ill will. So help me God.”

There is neither dispute nor doubt that the Judges of this Court do bear true allegiance to the Sovereign State of Uganda. That was never questioned by the learned Attorney-General. Indeed their remaining in their posts in response to the appeal by the Prime Minister already referred to, and on which the learned Attorney-General relied, is a clear testimony of their loyalty.

There is certainly an indisputable difference in the wording of the two oaths. But, in our view, this difference is more apparent than real; for both the oaths speak of the Constitution of Uganda and could only mean the one and the same Constitution. According to the judicial oath, a judge is sworn to do right to all manner of people in *accordance with the Constitution of the Sovereign State of Uganda as by law established*; but in the oath of allegiance, he undertakes to *preserve, protect and defend the constitution*. The question which naturally arises is: which Constitution is the judge sworn to defend? Could it be a Constitution not established by law? The answer without doubt must be that it is the Constitution of the Sovereign State of Uganda as by law established. That must be the position, because a judge, sitting in court, cannot normally be expected to preserve, protect and defend an illegal Constitution, that is to say, a Constitution which is not by law established.

It is a trite saying that justice must not only be done but must be seen to have been done. Having regard to the wording of the judicial oath, and since the presumption must be that both the oath of allegiance and the judicial oath mean the same Constitution, for there cannot be two Constitutions of Uganda in force at the same time, it must follow that the oath of allegiance in so far as it refers to the Constitution is incomplete. In order to bring it into line with the

judicial oath, there ought to be added the words “as by law established” after “Constitution”.

Be that as it may, there can be no doubt whatsoever that the judges of this court are bound by the judicial oath to administer justice according to the Constitution of the Sovereign State of Uganda as by law established and in accordance with the laws and usage of the Sovereign State of Uganda without fear or favour, affection or illwill.

One of the main functions of this court prescribed by the Constitution is the interpretation of the constitution itself. If it is the duty of this court to interpret the Constitution of the Sovereign State of Uganda it seems to us an extraordinary proposition to submit that this court cannot enquire into the validity of the Constitution. It would be difficult to sustain such a proposition. In our view, since it is the duty of the judges of this court to do right to all manner of people in accordance with the Constitution of the Sovereign State of Uganda as by law established, it must follow as the night follows the day, that it is an essential part of the duty of the judges of this court to satisfy themselves that the Constitution of Uganda is established according to law and that it is legally valid. The objection under this head cannot therefore be sustained.

The learned Attorney-General contended, under his third ground of objection, that this court has no jurisdiction to entertain any question concerning the validity of the Constitution; that since there are three arms of Government, the legislature, the executive and the judiciary, it was the duty of the legislature and the executive to decide the issue as to the validity of the Constitution, the issue being a political one, that the duty of the court was to accept that decision and merely interpret the Constitution as presented to it; that the members of the legislature, who had passed the Constitution, did so as representatives of their constituencies to which they must account; that since judges were not elected but appointed by the executive and therefore represented no specific constituencies to which to give account of their stewardship, the court would be usurping the function of the legislature, and, indeed, of the people of Uganda as represented in the legislature, if it undertook to enquire into and to pronounce on the validity or otherwise of the Constitution; and that the court, if by any chance, should come to the conclusion that the Constitution was invalid, the effect of such a decision would be far-reaching and disastrous and would even effect the position of the judges themselves, because the old Constitution having been annulled, all the judges are now operating the new Constitution from which their post is derived.

In the course of his submission, the court was referred to the 1963 revised and annotated edition of the Constitution of the United States of America, art. III, s. 2 at p. 611; and to the case of *Luther v. Borden* (7).

The passage of the American Constitution to which we were referred reads as follows:

“The rule has been long established that the courts have no general supervisory power over the executive or administrative branches of Government.”

The concept of “political question” is an old one. As early as *Marbury v. Madison*, Marshall, C.J., stated:

“The province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion. Questions in their nature political, or which are by the *Constitution and Laws*, submitted to the executive, can never be made in this court. The concept, as distinguished from that of

interference with executive functions, was first elaborated in *Luther v. Borden* (7), which involved the meaning of 'a republican form of government' and the question of the lawful government of Rhode Island between two competing groups purporting to act as the lawful authority.

“‘It is the province of the court to expound the law, not to make it’, declared Taney, C.J.”

It may be observed that this exposition of legal principles cannot be faulted. It is a sound doctrine if one may say so with respect, but the question which must be asked is: What is a political question in terms of this doctrine? And the answer is not far to seek. It is set out at p. 612 of the same Constitution based, it is suggested, on the decision in *Luther v. Borden* (7), and more particularly elaborated upon in *Baker v. Carr* (8). In *Luther v. Borden* (7) a political question is defined as “a question relating to the possession of political power, of sovereignty, of government, determination of which is based on Congress and the President, whose decisions are conclusive on the courts”.

The Constitution goes on to state that the more common classifications of cases involving political questions are:

1. Those which raise the issue of what proof is required that a Statute has been enacted, or a constitutional amendment ratified;
2. Questions arising out of the conduct of foreign relations;
3. The termination of wars or rebellions;
4. The question of what constitutes a republican form of government, and the right of a State to protection from invasion or domestic violence; questions arising out of political actions of a State in determining the mode of choosing presidential electors, and reapportionment of district for congressional representation; and suits brought by States to test their so-called sovereign rights.

It is noteworthy that the question of the validity of a constitution is not included in this somewhat exhaustive and formidable list.

A photostat copy of the judgment of the Supreme Court in *Luther v. Borden* (7) relied upon by the learned Attorney-General was kindly supplied to us. The facts of the case were briefly that at the time of the American Revolution, Rhode Island did not, like other States, adopt a new constitution, but was content to continue with the form of government established by the Charter granted to it by Charles II in 1663, but making only such alterations, by Acts of the Legislature, as were necessary to adapt it to their condition and rights as an independent state. But no mode of proceedings was pointed out by which amendments might be made.

In 1841, a portion of the people held meetings and formed associations, which resulted in the election of a convention to form a new constitution to be submitted to the people for their adoption or rejection. The convention framed a constitution, directed a vote to be taken on it, declared afterwards that it had been adopted and ratified by a majority of the people of the State, and was the paramount law and constitution of Rhode Island.

Under the Constitution, elections were held for the post of Governor, Members of the Legislature and other officers, who assembled together in May, 1842, and proceeded to organise the new government.

But the Charter Government, which had been governing the Island since 1663, did not admit the validity of or acquiesce in these proceedings. On the contrary, it passed stringent laws, and finally passed an act declaring the State under martial law; and since the new government established by the voluntary convention refused to yield, the Charter Government proceeded to call out the militia to

repel the threatened attack by the new government and those who were engaged in it, whom it treated as rebels.

In May, 1843, a new constitution, which had been promulgated by a convention called together by the Charter Government, went into operation and since then remained in office as the established and effective government of Rhode Island.

During the operation of the Martial law declared by the Charter Government, a large number of people, including the plaintiff, Martin Luther, who belonged to the government which had been established by the voluntary convention in 1841, rose in opposition to the Charter Government, and with a view to overthrowing it by military force, actually levied war upon the State under the effective control of the Charter Government.

The defendant, Luther M. Borden, with other supporters of the Charter Government was then in the military service of the State, and by the command of his superior officer broke and entered into the house and conducted a search of the rooms of the plaintiff, who was then supposed to be in hiding, for the purpose of having him arrested.

Subsequently the plaintiff brought an action of trespass against the defendant in the Circuit Court of Rhode Island. In his defence, the defendant pleaded that in breaking into the plaintiff's house, he had done so for the purpose of suppressing insurrection against the legitimate government of Rhode Island, which was the Charter Government.

The question for decision by the court was therefore: Which of the two opposing governments was the legitimate government of Rhode Island? Which in effect meant that the existence and authority of the Charter Government under which the defendant acted was called in question. The Circuit Court of Rhode Island decided that the lawful and effective government of Rhode Island at the material time was the Charter Government, which had ruled the Island since 1663; and therefore that the defendant was justified in the measure which he took in suppressing the insurrection by the government established by the voluntary convention of 1841. The plaintiff's action therefore failed.

On appeal by way of error to the Supreme Court of the United States of America, after an exhaustive review of the facts, the judgment of the Circuit Court was affirmed in these words:

"The question relates, altogether, to the constitution and laws of that State; and the well settled rule in this court is, that the courts of the United States adopt and follow the decisions of the State Courts in questions which concern merely the constitution and laws of that State.

Upon the whole, we see no reason for disturbing the judgment of the Circuit Court and we must therefore regard the Charter Government as the lawful and established government of the Island during the time of this contest."

It is true of course that before arriving at that decision, the Supreme Court pointed out that "the Constitution of the United States treated the subject (i.e. the question whether or not a majority of those persons entitled to suffrage voted to adopt a constitution cannot be settled in a judicial proceeding) as political in nature and placed the power of recognising a State Government in the hands of the Congress. Under the existing legislation of Congress, the exercise of this power by courts would be entirely inconsistent with that legislation".

In its strictures, the Supreme Court, quite properly, refused to be drawn into political questions in regard to the issue of suffrage and the number of votes. It observed finally that grave consequences

would result if it were to reverse the decision of the Circuit Court by holding that the Charter Government which

had governed the Island since 1663 was not the legitimate government of the island. It also pointed out, in what one may not be far wrong to describe with respect as counsels of perfection, that it was undesirable for Courts to embark on enquiries bordering on the political.

We are of opinion that however useful and instructive the observations of the Supreme Court on the several matters discussed in that case may be, the learned Attorney General was in error in relying on it as supporting the proposition that the issue as to the validity of the Constitution of 1966 was purely a political matter outside the scope of the jurisdiction of this Court.

In any case *Luther v. Borden* (7) is distinguishable from, and is irrelevant to, the circumstances of the instant case. In the first place in *Luther v. Borden* (7) there was a contest between two competing groups as to which should control the government of Rhode Island. There is no such contest in Uganda. The Government of Uganda is well established and has no rival. The question that was raised by the court was not as to the legality of the Government but as to the validity of the Constitution.

In the second place *Luther v. Borden* (7) raised all sorts of political questions, including the right to vote and the qualification of such voters. There were two rival governors appointed and the rivalry between the two governments produced a situation which was tantamount to a state of civil war. In fact insurrection had occurred and war was levied upon the State. There was also the question as to whether the Government was republican or not, which is a political question reserved for the decision of the Congress under the Constitution of the United States of America.

Then there is the recent case of *Baker v. Carr* (8) – which was an appeal from the decision of the United States District Court for the Middle District of Tennessee to the Supreme Court of the United States.

There the appellants were persons allegedly qualified to vote for the Members of the General Assembly of Tennessee representing the Counties in which they resided. They brought a suit in a Federal District Court in Tennessee under 42 U.S.C. paras. 1983 and 1988 on behalf of themselves and others similarly situated, to redress the alleged deprivation of their federal constitutional rights by legislation classifying voters with respect to representation in the General Assembly.

They alleged that by means of a 1901 Statute of Tennessee, arbitrarily and capriciously apportioning the seats in the General Assembly among the State's 95 counties and a failure to reapportion them subsequently notwithstanding substantial growth and redistribution of the State's population, they suffered a "debasement of their votes" and were thereby denied the equal protection of the laws guaranteed them by the Fourteenth Amendment.

They sought, inter alia, a declaratory judgment that the 1901 Statute was unconstitutional and an injunction restraining certain state officers from conducting any further elections under it. The District Court dismissed the complaint on the grounds that it lacked jurisdiction of the subject-matter, and that no claim was stated upon which relief could be granted, because the claim as presented raised a "question of the distribution of the political strength for legislative purpose". For, to quote the conclusion reached by the Court, "from a review of (numerous Supreme Courts) decisions there can be no doubt that the federal rule as enunciated and applied by the Supreme Court, is that the federal courts, whether from a lack of jurisdiction or from the appropriateness of the subject-matter for judicial consideration, will not intervene in cases of this type to compel legislative reapportionment".

On appeal to the Supreme Court, in the judgment of the Court delivered by Brennan, J., it was held:

- (1) that the District Court had jurisdiction to entertain the claim because the complaint asserted in the suit was the subject-matter of the federal constitutional claim;
- (2) that the appellants had standing to maintain the suit; and
- (3) That the complaint's allegations of a denial of equal protection presented a justiciable constitutional cause of action upon which the appellants were entitled to a trial and decision.

The decision of the District Court was therefore reversed and the case was sent back for retrial.

In a concurring judgment, Clark, J., said:

"It is well for this court to practice self-restraint and discipline in constitutional adjudication, but never in its history have those principles received sanction where the national rights of so many have been so clearly infringed for so long a time. National respect for the courts is more enhanced through the forthright enforcement of those rights rather than by rendering them nugatory through interposition of subterfuges. In my view the ultimate decision today is the greatest tradition of this court."

In his alternative submission, namely, that the 1966 Constitution is a valid constitution in law because it came into existence as a result of a revolution or a coup d'état, the learned Attorney General would appear to be on a firm ground.

The learned Attorney-General urged the Court to hold that the incidents which finally culminated in the promulgation of the 1966 Constitution had taken place abruptly. Most people were taken unawares. What happened then was a coup d'état. And coups d'état are recognised in international law as a proper and effective legal means of changing governments or constitutions in a country like Uganda, which is politically and completely independent and sovereign. In his attractive and impressive submission, the learned Attorney-General contended that the four cardinal requirements in international law to give the 1966 Constitution and Government of Uganda validity in law have clearly been fulfilled. These requirements are:

1. That there must be an abrupt political change, i.e. a coup d'état or a revolution.
2. That change must not have been within the contemplation of an existing Constitution.
3. The change must destroy the entire legal order except what is preserved; and
4. The new Constitution and Government must be effective.

Developing his argument on these requirements, counsel submitted that the declaration by the Prime Minister on February 22, 1966, annexure A; followed by the statement of February 24, 1966, in which the 1962 Constitution was suspended; the seizure of all powers of government by the Prime Minister; the setting up of the Security Council for Uganda; the forcible ejection of the President and Head of State and Commander-in-Chief from the State House, in consequence of which the latter ultimately fled the country; the abolition of the 1962 Constitution, followed immediately by the promulgation of the 1966 Constitution by a resolution of the National Assembly; the removal from the 1966 Constitution of the Order in Council by the authority of which the 1962 Constitution was established; the automatic assumption of office by operation of law by the then Prime Minister as the Executive President of Uganda with the power to appoint anyone Vice-President of Uganda; the abolition of appeals to the Privy Council; the abolition of the federal system of government and the High Court of Buganda; and the enfranchisement of the

people of Buganda who had been since 1962 disenfranchised – all these were not only abrupt but such fundamental changes not within the contemplation of the 1962 Constitution and therefore revolutionary in character. The end result was in law a revolution.

Counsel further contended that the 1966 Constitution was not only valid but legal, it being a constitution adopted by the people's representatives in a National Assembly for their people of Uganda; that since its adoption the people have accepted it with acclamation, and have unanimously given obedience to it as the best constitution for Uganda. And finally that by reason of the effectiveness of the Constitution the machinery of government has been functioning smoothly ever since. All taxes have been collected without resistance.

Counsel then referred the Court to Kelsen's General Theory of Law and State (1961 Edn.) at pp. 117 to 118; and the Pakistan case of *The State v. Dosso and Another* (9), as his authorities for the submission that the 1966 Constitution is legally valid and that the court should so hold.

These submissions are doubtless irresistible and unassailable. On the theory of law and state propounded by the positivist school of jurisprudence represented by the famous Professor Kelsen, it is beyond question, and we hold, that the series of events, which took place in Uganda from February 22 to April, 1966, when the 1962 Constitution was abolished in the National Assembly and the 1966 Constitution adopted in its place, as a result of which the then Prime Minister was installed as Executive President with power to appoint a Vice-President could not appropriately be described in law as a revolution. These changes had occurred not in accordance with the principle of legitimacy. But deliberately contrary to it. There were no pretensions on the part of the Prime Minister to follow the procedure prescribed by the 1962 Constitution in particular for the removal of the President and the Vice-President from office.

Power was seized by force from both the President and the Vice-President on the grounds mentioned in the early part of this judgment. There were even charges, to use the word in its popular sense, of treason having been committed by the then President.

The learned Attorney-General's contention was that the seizure of power in the manner in which it was done by the then Prime Minister was consistent with the principles of international law, although not based on the principle of legitimacy. In support of this proposition the attention of the court was drawn to the Kelsenian principles to be found in his General Theory of Law and State at various pages commencing from p. 117. The various passages to which we were referred are headed (c) The Principle of Legitimacy, (d) Change of the Basic Norm and (3) Birth and Death of the State as Legal Problems, which we now reproduce hereunder.

(c) *The Principle of Legitimacy*, p. 117-118 and 220:

"The validity of legal norms may be limited in time, and it is important to notice that the end as well as the beginning of this validity is determined only by the order to which they belong. They remain valid as long as they have not been invalidated in the way in which the legal order itself determines. This is the principle of legitimacy. This principle, however, holds only under certain conditions. It fails to hold in the case of a revolution, this word understood in the most general sense, so that it also covers the so-called coup d'état. A revolution, in this wide sense, occurs whenever the legal order of a community is nullified and replaced by a new order in an illegitimate way, that is, in a way not prescribed by the first order itself. It is in this context irrelevant whether or not this replacement is effected through a violent uprising against those individuals who so far have been the legitimate organs competent to create and amend the legal order. It is equally

irrelevant whether the replacement is effected through a movement emanating from the mass of the people, or through the action from those in government positions. From a juristic point of view, *the decisive criterion of a revolution is that the order in force is overthrown and replaced by a new order in a way which the former had not itself anticipated*. Usually, the new men whom a revolution brings to power annul only the constitution and certain laws of paramount political significance, putting other norms in their place. A great part of the old legal order ‘remains’ valid also within the frame of the new order. But the phrase ‘they remain valid’ does not give adequate description of the phenomenon. It is only the contents of these norms that remain the same, not the reason of their validity. They are no longer valid by virtue of having been created in the way the old constitution prescribed. That constitution is no longer in force; it is replaced by a new constitution which is not the result of a constitutional alteration of the former. If laws which were introduced under the old constitution ‘continue to be valid’ under the new constitution, it is possible only because the validity has expressly or tacitly been vested in them by the new constitution. The phenomenon is a case of reception (similar to the reception of Roman Law). The new order ‘received’, i.e. adopts norms from the old order; this means that the new order gives validity to (puts into force) norms which have the same content as norms of the old order. ‘Reception’ is an abbreviated procedure of law creation. The laws which, in the ordinary inaccurate parlance continue to be valid are, from a juristic viewpoint new laws whose import coincides with that of the old laws. They are not identical with the old laws, because the reason for their validity is different. The reason for their validity is the new, not the old, constitution, and between the two continuity holds neither from the point of view of the one nor from that of the other. Thus it is never the constitution merely but always the entire legal order that is changed by a revolution.

This shows that all norms of the old order have been deprived of their validity by a revolution and not according to the principle of legitimacy. And they have been so deprived not only *de facto* but also *de jure*. No jurist would maintain that even after a successful revolution the old constitution and the laws based thereupon remain in force, on the ground that they have not been nullified in a manner anticipated by the old order itself. Every jurist will presume that the old order – to which no political reality any longer corresponds – has ceased to be valid, and that all norms, which are valid within the new order, receive their validity exclusively from the new constitution. It follows that, from this juristic point of view the norms of the old order can no longer be recognised as valid norms.”

(d) *Change of the basic norm.*

“It is just the phenomenon of revolution which clearly shows the significance of the basic norm. Suppose that a group of individuals attempt to seize power by force, in order to remove the legitimate government in a hitherto monarchic system, and to introduce a republican form of government. If they succeed, if the old order ceases, and the new order begins to be efficacious, because the individuals whose behaviour the new order regulates actually behave, by and large, in conformity with the new order, then this order is considered as a valid order. It is now according to this new order that the actual behaviour of individuals is interpreted as legal or illegal. But this means that a new basic norm is presupposed. It is no longer the norm according to which the old monarchical system is valid, but a norm endowing the revolutionary government with legal authority. If the revolutionaries fail, if the order they have tried to establish remains inefficacious, then, on the other hand their undertaking is interpreted, not

as legal, a law-creating act, as the establishment of a constitution, but as an illegal act, as the crime of treason, and this according to the old monarchic constitution and its specific basic norm.”

(3) *Birth and Death of the State as Legal Problems*: at p. 220.

“The problem as to the beginning and ending of the existence of a State is a legal problem only if we assume that international law really embodies some such principle as indicated in the foregoing chapter. Even though some authors advocate the opposite view, the whole problem, as usually formulated, has a specifically juristic character. It amounts to the question: Under what circumstances does a national legal order begin or cease to be valid? The answer, given by international law, is that a national legal order begins to be valid as soon as it has become – on the whole – efficacious; and it ceases to be valid as soon as it loses this efficacy. The legal order remains the same as long as its territorial sphere of validity remains essentially the same, even if the order should be changed in another way than that prescribed by the Constitution, in the way of a revolution or coup d’etat. A victorious revolution or a successful coup d’etat does not destroy the identity of the legal order which it changes. The order established by revolution or coup d’etat has to be considered as a modification of the old order, not as a new order, if this order is valid for the same territory. *The government brought into permanent power by a revolution or coup d’etat is, according to international law, the legitimate government of the State, whose identity is not affected by these events.* Hence, according to international law, victorious revolutions or successful coups d’etat are to be interpreted as procedures by which a national legal order can be changed. Both events are, viewed in the light of international law, law creating fact. Again *injuria jus oritur*: and it is again the principle of effectiveness that is applied.”

The effect of these submissions and references to the Kelsenian principles quoted above on this aspect of the case, is that the 1966 Constitution was the product of a revolution. Of that there can be no doubt. The Constitution had extra legal origin and therefore created a new legal order. Although the product of a revolution, the Constitution is none-the-less valid in law because in international law revolutions and coups d’etat are the recognised methods of changing governments and constitutions in sovereign states. For, in the language of James Bryce in his *Studies in History and Jurisprudence*, Vol. 2 (1904 Edn.) at p. 107:

“Knots which the law cannot untie may have to be cut by the sword.”

According to Salmond on *Jurisprudence* (11th Edn.) by Glanville Williams, at p. 101:

“Every constitution has an extra legal origin, the best illustration being the United States of America which in open and forcible defiance of English law broke away from England and set up new states and constitution the origin of which was not merely extra legal but was illegal.”

“Yet, so soon as those constitutions succeeded in obtaining de facto establishment in the rebellious colonies they received recognition as legally valid from the courts of the colonies. Constitutional law followed hard upon the heels of constitutional facts. Courts, legislatures and law had alike their origin in the constitution and therefore the constitution cannot derive its origin from them. So also with every constitution that is altered by way of illegal revolution. By what legal authority was the Bill of Rights 1686 passed, and by what legal title did William III assume the crown?”

In *The State v. Dosso and Another* (9) on October 7, 1958, the then President of Pakistan, feeling himself unable to cope with the problems of Pakistan, and to maintain peace and order, declared martial law by proclamation throughout Pakistan; annulled the constitution of Pakistan of March 23, 1956; dismissed the Central Cabinet as well as the Provincial Cabinets; dissolved both the National and Provincial Assemblies; and appointed General Ayub Khan Commander-in-Chief of the Army, as the Chief Martial Law Administrator.

Three days later the President promulgated the Laws (Continuance in Force) Order, the general effect of which was the validation of laws, other than the annulled constitution, which were in force before the proclamation, and restoration of the jurisdiction of all courts including the Supreme Court and the High Courts.

It was also directed in the order that thereafter the country was to be known as Pakistan and not the Islamic Republic of Pakistan. The order also declared all orders and judgments made or given by the Supreme Court between the proclamation and the promulgation of the Order to be valid and binding but saving such orders, no writ or order for a writ issued or made after the proclamation was to have effect, unless it was provided for in that Order, and all applications and proceedings in respect of any writ not so provided for were to abate forthwith.

There were four appeals brought before the Supreme Court, and they involved the question whether the writs issued by the High Court in respect of orders of release to a Council of Elders, or convictions under s. 11 of the Frontier Crimes Regulations 1901, on the ground of repugnancy to art. 5 of the Constitution of 1956 had abated by reason of cl. 7, art. 2 of the Laws (Continuance in Force) Order. The court was to determine the effect of the proclamation and the Order on the writ jurisdiction of the High Court including pending applications for writs and writs already issued which were subject of appeals in the Supreme Court.

It was held by the majority of the court, Muhammad Munir, C.J. (Shahabaddin and Amiruddin Ahmad, JJ.) that the President's proclamation of October 7, 1958, by which the constitution of 1956 was annulled and martial law was proclaimed constituted an "abrupt political change", not within the contemplation of the said constitution, i.e. a revolution. A victorious revolution is an internationally recognised legal method of changing a constitution.

Such a revolution constitutes a new law creating organ, by virtue of having become a basic law creating fact.

Laws which derive from the "old order" may remain valid under the "new order" "only because validity has expressly or tacitly been vested in them by the new constitution"; "and it is only the contents of these norms that remain the same, not the reason of the validity".

Further "no jurist would maintain that even after a successful revolution, the old constitution and the laws based thereupon remain in force, on the ground that they have not been nullified in a manner anticipated by the old order itself.

It was also held that the Laws (Continuance in Force) Order was a new legal order, and that it was, in accordance with that order that the validity of laws and the correctness of judicial decisions had to be determined.

On the point of the survival of the fundamental rights, it was held unanimously that they were no longer a part of the new legal order, as the constitution of 1956 had been expressly excluded from the list

of laws in art. 4 of that Order which were continued in force by the new regime; and, moreover, the President had assumed full power to make adaptations in any such laws, thus overriding the prohibitions contained in art. 4 of the Constitution of 1956, against laws contravening the fundamental rights; and that the appeals being pending proceedings

in relation to a writ sought on the ground that a fundamental right had been contravened, must abate forthwith under art. 2 (7) of the Laws (Continuance in Force) Order.

Applying the Kelsenian principles, which incidentally form the basis of the judgment of the Supreme Court of Pakistan in the above case, our deliberate and considered view is that the 1966 Constitution is a legally valid constitution and the supreme law of Uganda; and that the 1962 Constitution having been abolished as a result of a victorious revolution in law does no longer exist nor does it now form part of the Laws of Uganda, it having been deprived of its de facto and de jure validity. The 1966 Constitution, we hold, is a new legal order and has been effective since April 14, 1966, when it first came into force.

We have before us a large number of affidavits sworn to by a large number of officials, the purpose of which is to prove to the satisfaction of the court that the new Constitution is efficacious and that it has been accepted by the people since it came into force in April, 1966. However, we need only mention eight of these affidavits, which we consider of considerable importance, as we are of the opinion that it was unnecessary to file such a large number of affidavits merely for the purpose of establishing that the new 1966 Constitution has been accepted without opposition and that since its inception the machinery of government has been functioning smoothly. The affidavits which we would like to mention are those sworn to by Mr. Francis Kalemera Kalimuzo, the Secretary, Cabinet, since 1962; Godfrey Lukongwa Binaisa, Esq., the learned Attorney-General, since 1962; Mr. Erenayo Wilson Oryema, Inspector General of Police, since 1964; Mr. Valerian Assa Ovonji, Permanent Secretary of the Ministry of Public Service; Mr. David Oyite Ojok, Deputy Assistant Adjutant and Quartermaster-General of the Uganda Armed Forces including the Uganda Air Force; Mr. Wilson Okumu Lutara, Permanent Secretary, Ministry of Defence; Mr. Zerubaberi Hosea Kwanya Bigirwenkya, Permanent Secretary, Ministry of Foreign Affairs; and Mr. Alfred Mubanda, Permanent Secretary, Ministry of Regional Administrations.

After a perusal of these affidavits, the contents of which have not been in any way challenged or contradicted, we are satisfied and find as a fact that the new Constitution has been accepted by the people of Uganda and that it has been firmly established throughout the country, the changes introduced therein having been implemented without opposition, as there is not before us any evidence to the contrary.

We would however like to refer in particular to the affidavit sworn to by Mr. Bigirwenkya, Permanent Secretary, Ministry of Foreign Affairs, the substance of which is that ever since the coming into force of the new Constitution and the installation of the new Executive President and the new Government recognition has been accorded to the new Government by all foreign countries with which Uganda deals. We would like to point out that Uganda, being a well-established independent state, the question of its recognition since the installation of the new Head of State by other nations is of considerable importance. As was said by L. Oppenheim in his *Treatise on International Law* (8th Edn.), Vol. I, at p. 129:

“Recognition of a new State must not be confused with recognition of a new head of government of an old State. Recognition of the change in the headship of a State, or in the form of its government, or a change in the title of an old State, are matters of importance. But the granting or refusing of this recognition has nothing to do with the recognition of the State itself. If a foreign State refuses to recognise a new head or a change in the form of the government of an old state the latter does not thereby lose its recognition as an international personality, although no official intercourse is henceforth

possible between the two States as long as recognition is not given either expressly or tacitly. If recognition of a new title of an old State is refused, the only consequence is that the latter cannot claim any privileges connected with the new title.”

We would like to emphasise, however, that the question of the recognition of the new Head of State of Uganda by foreign nations is not strictly within the scope of this enquiry. For, in our view it is not within the province of this court, nor is it within its competence to accord recognition to the government or international status of the government of this country which is our own country. Courts, legislatures and the law derive their origins from the constitution, and therefore the constitution cannot derive its origin from them, because there can be no law unless there is already a state whose law it is, and there can be no state without a constitution.

We now return to consider the second question of this reference, namely:

“Whether the Emergency Powers Act, 1963, and the Emergency Powers (Detention) Regulations 1966, or any material part thereof are ultra vires the Constitution to the extent that the Act and the Regulations enable the President to take measures or authorise the taking of measures that may *not be reasonably justifiable* for the purpose of dealing with the situation that exists during the period when a declaration of a state of public emergency is in force within the meaning of art. 30 (5) of the Constitution.”

Counsel for the applicant in presenting the case of the applicant prefaced his submissions with quoting the provisions of art. 1 of the Constitution which declares the Constitution “to be the supreme law of Uganda”. He pointed out that any law which was inconsistent therewith must be declared void to the extent of such inconsistency. He drew the attention of the court to art. 30 (5) of the Constitution, the provisions of which are in the following terms:

“30(5) Nothing contained in or done under the authority of an Act of Parliament shall be held to be inconsistent with or in contravention of arts. 19, 24 or 29 of this Constitution to the extent that the Act authorised the taking, during any period when Uganda is at war or any period when a declaration of a state of public emergency under this article is in force of measures that are reasonably justifiable for the purpose of dealing with the situation that exists during that period.”

Counsel submitted that the important words in the clause are “reasonably justifiable”; and that the words reasonably justifiable are the key words in the clause and may be described as words of limitation, limiting the type of measures that may be authorised by Parliament to be taken in dealing with a state of public emergency; that it was within the power of this court to examine such measures authorised by Parliament in order to see whether they were reasonably justifiable in the present state of emergency in Uganda; that any Act of Parliament which authorised measures not reasonably justifiable must be held by the court to be ultra vires art. 30 (5) of the Constitution; and that in examining such measures the court must apply an objective test.

Counsel then referred the court to the provisions of s. 3(1)(2) (a) of the Emergency Powers Act (Cap. 307), and reg. 1 of the Emergency Powers (Detention) Regulations 1966, Statutory Instrument No. 65 of 1966, and contended that they were ultra vires art. 30(5) of the Constitution in that under the Emergency Powers Act the Minister is made the sole judge as to whether or not the measures taken by him are reasonably justifiable; and that under reg. 1 the Minister alone is to be satisfied.

The relevant sections of the Emergency Powers Act 1963 and of the Emergency Powers (Detention) Regulations 1966 the subject-matter of this complaint are as hereunder set forth:

- “3.(1) Whenever an emergency proclamation is in force, the President may make such regulations as appear to him to be necessary or expedient for securing the public safety, the defence of Uganda, the maintenance of public order and the suppression of mutiny, rebellion and riot, and for maintaining supplies and services essential to the life of the community.
- (2) Without prejudice to the generality of the powers conferred by sub-section (1) of this Section, emergency regulations may so far as appears to the President to be necessary or expedient for any of the purposes mentioned in that subsection:
 - (a) make provision for the detention of persons or the restriction of their movements, and for the deportation and exclusion from Uganda of persons who are not citizens of Uganda.”

Regulation 1 (1) of the Emergency Powers (Detention) Regulations 1966 made pursuant s. 3 of the Emergency Powers Act reads as follows:

- “1.(1) Whenever *the Minister is satisfied* that for the purpose of maintaining public order it is necessary to exercise control over any person, the Minister may make an order against such person directing that he be detained, and thereupon such person shall be arrested and detained.
- (2) At any time after a detention order has been made against any person under this Regulation, the Minister may revoke or vary the order; or may direct that the operation of the order be suspended subject to such condition:
 - (a) ...
 - (b) ...
 - (c) ...
 - (d) ...
 - (e) ...

as the Minister thinks fit, and the Minister may revoke or vary any such direction whenever he thinks fit.”

Counsel submitted that since Uganda is governed under a written Constitution the National Assembly is not as supreme a legislature as the United Kingdom Parliament; that the power of the National Assembly is well defined in the Constitution of Uganda; and that the power which the National Assembly could confer on a Minister is equally restricted, as it is subject to the rule of inconsistency with the Constitution. That being so, the power which the National Assembly could confer on a Minister is not comparable to the power which Parliament in the United Kingdom could confer on Ministers or, in particular, on the Home Secretary under the Defence Regulations.

Counsel for the applicant then contended that the powers given to the Minister of Internal Affairs by the Parliament of Uganda under s. 3(1) of the Emergency Powers Act 1963, as well as those conferred on him under reg. 1 of the Emergency Powers (Detention) Regulations 1966, are too wide. They are not subject to any condition or limitation. In particular under reg. 1 of the Emergency Powers (Detention) Regulations, Counsel submitted, the only person to be satisfied before invoking these powers is the Minister of Internal Affairs. In his contention therefore the Emergency Powers Act 1963 and the Emergency Powers (Detention) Regulations 1966 by giving such unfettered powers to the Minister of Internal

Affairs were ultra vires art. 30 (5) of the Constitution and that they should be so declared by the Court.

The learned Attorney-General, in his submission contended that, while he agreed that the powers of the Parliament of Uganda were controlled and regulated by the Constitution of Uganda and that the Emergency Powers Act 1963 and the Emergency Powers (Detention) Regulations 1966 made thereunder must be considered in the light of the provisions of art. 30 (5) of the Constitution, the burden was upon the counsel for the applicant to show the respect in, and the extent to which the Act and the Regulations are said to be ultra vires art. 30 (5) of the Constitution, and that counsel has failed to discharge that burden.

On the authorities of *King v. Halliday* (10); *Liversidge v. Anderson and Another* (11); *R. v. Home Secretary, Ex parte Greene* (12), and *R. v. Metropolitan Police Commissioner, Ex parte Hammond* (13), Counsel submitted that no government would embark on proclaiming a state of emergency unless the situation was really grave and warranted it, and that in the grave situation which had developed in this country Parliament was competent to give to the Minister of Internal Affairs discretion in the exercise of his most difficult office of maintaining law and order.

We may at the risk of repetition here recapitulate the events already described by us in the early part of this judgment in connection with the declaration of a state of emergency. A state of public emergency was declared on May 23, 1966, and approved on May 25, 1966, by the National Assembly. A number of Emergency Powers Regulations, including the Emergency Powers (Detention) Regulations, the subject-matter of this complaint, which were made by the Minister of Internal Affairs in virtue of the powers vested in him by the Transfer of Powers and Duties (No. 2) Order 1965, Statutory Instrument No. 91 of 1965, were all approved and affirmed by a resolution of the National Assembly in due compliance with the provisions of s. 5 of the Emergency Powers Act 1963 on May 25, 1966. That resolution was moved by the Minister of Internal Affairs. The regulations were immediately brought into force (see annexure I, p. 52 – official report of the proceedings of the National Assembly).

It is noteworthy that these regulations were debated and passed by the National Assembly, the membership of which is in the neighbourhood of over eighty. It is difficult to see how this court can, by the application of an objective test, which is an operation in the abstract, hold that the powers which over eighty citizens of Uganda, Members of Parliament had considered reasonably justifiable to be granted to the Minister to enable him to deal with a serious situation in the country, was not reasonably justifiable in the existing situation.

The Minister concerned is responsible to Parliament for his conduct and therefore not free from control. His activities are subject to constant check by Members of Parliament. Indeed his task is an invidious one for the burden of his responsibility is great.

Now counsel for the applicant has requested this court to apply an objective test in the interpretation of the words “*measures that are reasonably justifiable*”, and that it is the duty of this court to interpret the phrase within the context of the Constitution.

We must confess that it was difficult to appreciate counsel’s submission that the test to be applied must be an objective one. Indeed to apply an objective test to the interpretation of the phrase “reasonably justifiable” would be tantamount to importing into the provisions of the Constitution what was never intended; and that might do untold damage to the provisions as a whole. A careful examination of the whole of the provisions of art. 30 (5), which incidentally must be read as a whole, clearly shows that the phrase “reasonably justifiable” is qualified by the sentence which follows it.

The Article provides that an Act of Parliament may authorise the taking during any period when Uganda is at war or any period when a declaration of a state of public emergency is in force, of *measures that are reasonably justifiable for the purpose of dealing with the situation which exists during that period*. The test applicable therefore must be a subjective one. Such measures must be reasonably justifiable for the purpose of dealing with the situation which exists at any particular time, and therefore whatever measures are adopted must depend upon how grave the situation is at any given time.

We think it unsound for counsel for the applicant to complain that Parliament exceeded its powers by passing or approving reg. 1 of the Emergency Powers (Detention) Regulations, which imposed on the Minister of Internal Affairs the onerous duty of being personally satisfied before he could make an order of detention against any person. We do not think that the performance of his duty and the exercise of his discretion in the circumstances of the instant case can be the subject of a judicial review.

It was not clear whether counsel for the applicant would rather that every case of detention should go to Parliament and that the Minister should only issue his order for the detention of a person concerned if Parliament had debated the case and been satisfied that the prospective detainee should be detained. That of course would be absurd; and would certainly defeat the whole object of the exercise as the Minister has to act on secret information supplied to him from various sources. In any case such a practice would be inconsistent with and would render the ministerial system of government a farce. It would give the impression that a Minister could not be entrusted with responsibility and be expected to exercise his discretion and satisfy his conscience before making an order so grave as that of detention.

As was said in *Liversidge v. Anderson and Another* (11), by Lord Macmillan ([1941] 3 All E.R. at p. 363):

“Is the standard of reasonableness which must be satisfied an impersonal standard independent of the Secretary of State’s own mind, or is it the personal standard of what the Secretary of State himself deems reasonable? Between these two readings there is a fundamental difference in legal effect. In the former case, the reasonableness of the cause which the Secretary of State had for his belief may, if challenged, be examined by a Court of Law in order to determine whether he had such cause of belief as would satisfy the ordinary reasonable man, and, to enable the court to adjudicate upon this question, there must be disclosed to it the facts and circumstances which the Secretary of State had before him in arriving at his belief. In the latter case, it is for the Secretary of State alone to decide in the forum of his own conscience whether he has a reasonable cause of belief, and he cannot, if he has acted in good faith, be called upon to disclose to anyone the facts and circumstances which have induced his belief, or to satisfy anyone but himself that those facts and circumstances constituted a reasonable cause of belief.”

These remarks, which are pertinent to the point under consideration raised by the counsel for the applicant, were made by Lord Macmillan in the course of his judgment on the interpretation of certain words contained in the Defence (General) Regulations, 1939, reg. 18b (1). By that regulation the Secretary of State was empowered to make an order for the detention of any person if he has “*reasonable cause to believe any person to be of hostile origin or associations or to have been recently concerned in acts prejudicial to the public safety, . . .*”.

Having given careful consideration to the submissions of counsel, we are of opinion that the counsel for the applicant has failed to satisfy us that the Emergency Powers Act, 1963 and the Emergency Powers (Detention) Regulations

1966 in so far as they relate to the case under consideration are ultra vires art. 30 (5) of the Constitution of Uganda. Our answer to the second question therefore is in the negative as we are satisfied that both the Act and the Regulation are intra vires and in due conformity with the provisions of the Constitution.

It was contended by counsel for the applicant in respect of the third question of this reference, namely:

“Whether any of the provisions of art. 31 (1) of the Constitution has been contravened in relation to the applicant having regard to the affidavits filed herein by and on behalf of the applicant on the one hand, and on behalf of the State on the other hand,”

that the provisions of arts. 31(1)(a), 31(1)(b) and 31(1)(c) were not complied with because respectively:

- (1) the applicant was not furnished within five days of his detention with a statement in writing specifying in detail the grounds for his detention as required by art. 31(1)(a) of the Constitution;
- (2) the detention of the applicant was not published within fourteen days after the commencement of his detention as required by art. 31(1)(b) of the Constitution; and
- (3) the review of the applicant’s case was done by a tribunal not established by law; and that the composition of the tribunal, apart from the Chairman appointed by the Chief Justice, were not independent as required by art. 31(1)(c) of the Constitution.

In elaborating his contention on this point counsel referred the court to the affidavit filed by the applicant details of which we have set out at the early part of this judgment. In that affidavit the applicant in substance swore that he was rearrested after having been released on July 16, 1966, and detained at Luzira Prison; that it was only on August 11, 1966, that a detention order was served on him together with a piece of paper headed: “*Statement required under s. 31(1)(a) of the Constitution of Uganda*”. The contents of the paper read as follows:

“You are hereby notified that on August 10, 1966, the Minister of Internal Affairs signed an order for your detention under reg. 1 of the Emergency Powers (Detention) Regulations 1966.

The grounds on which you are being detained are that you are a person who has acted or is likely to act in a manner prejudicial to the public safety and maintenance of public order.”

The affidavit of the applicant continued to the effect that the notification of his detention was only published as General Notice No. 832 of 1966 in the Uganda Gazette on August 19, 1966; and that on August 26, 1966, he appeared before a tribunal comprising the Honourable Mr. Justice Sheridan as Chairman and Mr. Wanambwa and Mr. Inyoin as members.

The contention of counsel on this aspect of the case was that the only independent member of the tribunal was Sheridan, J.; and that, although he did not entertain any doubt as to the impartiality of Mr. Wanambwa and Mr. Inyoin, but because they are District Commissioners they could not be regarded as independent; and that the presumption must be that they were not free from the influence of the executive. It was also submitted by counsel that the tribunal had not been established by law.

We think that counsel for the applicant was under misapprehension in asserting that the detention of the applicant commenced on July 16, 1966, when he was apprehended by the Police; and that the tribunal for the review of the case of

the detainee was not properly established by law. Under reg. 3 of the Emergency Powers (Detention) Regulations 1966 which, as already stated, was approved and affirmed by Parliament, the Police are empowered to arrest and detain any person reasonably suspected to be a person who has acted, is about to act or likely to act in a manner prejudicial to the public safety and maintenance of public order for a period not exceeding twenty-eight days. Such detention is not a detention by the order of the Minister.

It may be that the Police in detaining such a person may do so for the purpose of making enquiries to enable them to submit to the Minister a report for consideration as to whether a detention order should be made. To constitute a detention under reg. 1 of the Emergency Powers (Detention) Regulations 1966 an order signed by the Minister authorising such a detention must be served on the detainee; and it is after such service that it could be said that the person was detained by the Minister in the exercise of his powers under the Regulations; and it is only then that the time prescribed under the Constitution would begin to run.

In the instant case therefore, on the affidavit of the applicant himself and of the Minister of Internal Affairs, the applicant was detained only as from August 11, 1966, when he was served with the order of detention signed by the Minister. It is clear that the statement with which he was furnished on August 11, 1966, was within the time prescribed under art. 31(1)(a) of the Constitution.

It should also be noted that the actual order of detention was issued by the Minister of Internal Affairs on August 10, 1966; and that must be regarded as the day in which the Minister of Internal Affairs felt satisfied that the applicant ought to be detained.

The tribunal was established by law under reg. 5 of the Emergency Powers (Detention) Regulations 1966. As already stated, those regulations were approved and affirmed by a resolution of Parliament on May 25, 1966. The appointment of the members of the tribunal was gazetted on August 5, 1966, as General Notice No. 776 of 1966. The applicant's case was reviewed on August 26, 1966, by the tribunal, that is to say, within a period of less than one month in terms of art. 31(1)(c) of the Constitution.

Although in his submission, counsel for the applicant was at pains to impress upon the court that there was no imputation of partiality directed against the other two members of the tribunal, we regard with disfavour the imputation that the other two members of the tribunal were not independent of executive influence. There was not a shred of evidence produced before us in support of such a serious allegation.

One would have thought that the two men concerned, who undoubtedly must have done well in the public service of Uganda to have risen to the senior posts of District Commissioners, and who owed their appointment to the Public Service Commission, ought to be regarded as men of integrity and high reputation with independent minds. It would be wrong and unjustified to assume otherwise.

As the learned Attorney-General rightly pointed out in his submission, the question of impartiality and independence are questions of fact. It is of some significance that the applicant did not depose in his affidavit that the tribunal which reviewed his case was not independent and impartial.

We would however observe, not necessarily because of the complaint made by the counsel for the applicant in the present case, that it is desirable wherever and whenever possible and practicable that the Minister of Internal Affairs should consider replacing government administrative officers with non-government employees as members of the tribunal. Such a change, we believe, would be all to the good and might serve to place the membership of the tribunal like Caesar's wife above suspicion.

We are not satisfied that the paper headed “Statement required under s. 31(1)(a) of the Constitution” to which we have already referred, contains sufficient detail of the grounds for the detention of the applicant. The statement appears to be in a stereotype form. The applicant was therefore justified in complaining that the statement served on him on August 11, 1966, did not furnish him with sufficient details of the reason for his detention.

From the point of view of this court, this is a very difficult question. It is not clear to us why art. 31(1)(a) of the Constitution should have required the Minister to furnish a detainee with a statement in writing specifying in detail the grounds upon which he is detained. One wonders the extent to which the Minister could go in the specification of the grounds for detaining a person. The Minister of Internal Affairs, in virtue of his position, must of necessity obtain his information through secret and confidential sources. It might not be in the interests of public security that such sources be disclosed.

However that may be, we think that under art. 31(1)(a) of the Constitution, it is the duty of the Minister of Internal Affairs to supply the applicant with a statement in writing setting out the grounds upon which his detention was ordered. We do not think that the mere specification of the grounds would necessarily involve the disclosure of the source or sources of information. To that extent our decision on this particular issue of the third question is that art. 31(1)(a) has not been satisfactorily complied with by the Minister.

Insufficiency of the statement of the grounds of detention served on the applicant is a mere matter of procedure. It is not a condition precedent but a condition subsequent. We hold therefore that it is not fatal to the order of detention made by the Minister. It is curable because the High Court under art. 32(2) of the Constitution has the power to give such directions as it may consider proper for the purpose of enforcing or securing the enforcement of any of the provisions of arts. 17 to 29 inclusive, or cl. (1) of art. 31 of the Constitution.

Our answer on the third question of this reference is in the affirmative but only to the extent of our observations that the statement furnished to the applicant was, in our view, not sufficient to enable him to prepare his defence for the review of his case before the tribunal.

Our order, therefore, is that this matter be sent back to the judge, who had referred the same to us, to dispose of it in accordance with our decision in so far as the issues of the interpretation of the Constitution are concerned; and that before such disposal, the judge to direct that art. 31(1)(a) of the Constitution be complied with by the Minister of Internal Affairs by serving the applicant with a statement specifying in detail the grounds upon which he is under detention.

In concluding this judgment we would like to express our indebtedness to the learned Attorney-General, who was good enough to make available to us all the relevant public papers and proceedings concerning this case as well as photostat copies of the judgments of foreign cases, which are not available in the library of this court. We also would like to express publicly our appreciation of the assistance given to us by both counsel in this difficult case. Both sides had fought the case with outstanding ability.

Matter referred back for disposal in accordance with the court's interpretation of the Constitution; direction that a statement of grounds of detention be supplied.

For the applicant:

Abu Mayanja & Co., Kampala

Abu Mayanja

For the respondent:

The Attorney-General, Uganda

G. L. Binasisa, Q.C. (Attorney-General) and P. J. Nkambo Mugerwa (Solicitor-General)

Jesse Kimani v McConnell and another
[1966] 1 EA 547 (HCK)

Division: High Court of Kenya at Nairobi
Date of judgment: 10 February 1966
Case Number: 504/1965
Before: Harris J
Sourced by: LawAfrica

[1] *Practice – Judgment ex parte – Meaning of ex parte – Considerations affecting court’s discretion to set it aside – Civil Procedure (Revised) Rules, 1948, O. 9, r. 10 and r. 24 (K).*

Editor’s Summary

The defendants applied to have an ex parte judgment set aside in the following circumstances; they had negotiated with the plaintiff for the sale of their farm and equipment near Nairobi to the extent that the plaintiff entered into possession on terms after executing an engrossed version of an agreement for sale tendered by the defendants’ advocates. The defendants refused to execute the agreement alleging that its terms went beyond their instructions to their advocates. The plaintiff sued for specific performance of the agreement and in default of a defence listed the case for formal proof ex parte. A notice of motion on behalf of the defendants to extend the time for filing a defence and to stay the ex parte hearing was listed, heard and dismissed immediately before the ex parte hearing. There-upon the ex parte hearing took place in the defendants’ absence and judgment was entered for the plaintiff. At the defendants’ application to set this judgment aside under O. 9, r. 10 and r. 24 the plaintiff contended firstly, as a preliminary objection which failed, that the judgment obtained was inter partes since the defendants were sent a hearing notice and both participated and were defeated in proceedings for a stay of the ex parte hearing and secondly, if the judgment was ex parte, that the defendants were not prevented from filing a defence in time, that they had no good defence and that the judgment obtained had vested a right in the plaintiff. The defendants argued in person that the judgment was capable of being set aside, that there were triable issues favourable to themselves, that they had made a bona fide application for leave to file defences out of time and to stay the ex parte hearing, that they were not personally at fault and that no irreparable damage would result to the plaintiff if their applications were allowed.

Held –

- (i) assuming, without deciding, that O. 9, r. 10, was restricted to ex parte judgments, the judgment obtained by the plaintiff was ex parte because the notice of motion of the defendants for a stay,

followed by their withdrawal, did not constitute an appearance;

Satish Chandra Mukerjee v. Ahara Prasad Mukerjee (1907), 34 Cal. 403, followed.

- (ii) after considering the purpose of O. 9, r. 10 and r. 24, and enquiring whether any different material factor entered into the passing of the ex parte judgment, and so finding, and after reviewing the surrounding circumstances and the merits of each case the court's discretion would be exercised in favour of the defendants on terms.

Application allowed, ex parte judgment set aside on condition that defences filed within 28 days.

Cases referred to in judgment:

- (1) *Wise v. Kishenkoomar and Another*, 4 Moore's Indian Appeals 201.
- (2) *National and Grindlays Bank Ltd. v. Kentiles Ltd.*, ante, p. 17.
- (3) *Satish Chandra Mukerjee v. Ahara Prasad Mukerjee* (1907), 34 Cal. 403.
- (4) *Din Mohamed v. Lalji Visram & Co.* (1937), 4 E.A.C.A. 1.

- (5) *H. Clark (Doncaster) Ltd. v. Wilkinson*, [1965] 1 Ch. 694; [1965] 1 All E.R. 934.
- (6) *Branca v. Cobarro*, [1947] K.B. 845; [1947] 2 All E.R. 101.
- (7) *Rossiter v. Miller* (1878), 3 App. Cas. 1124.
- (8) *Gatti v. Shoosmith*, [1939] 1 Ch. 841; [1939] 3 All E.R. 916.
- (9) *Wood v. Manchester Corporation* (unreported).

Judgment

Harris J: This is an application by the defendants to set aside a judgment in default of defence passed by this court on September 20, 1965, and the decree consequent thereon, whereby the plaintiff was granted an order for specific performance of a contract for sale of certain immovable property and chattels into which the defendants were said to have entered earlier in the year. The application, as amended by consent, is brought under the provisions of rr. 10 and 24 of O. IX of the Civil Procedure (Revised) Rules, 1948, and under the inherent jurisdiction of the court.

Before dealing with the substantial issues raised by the application it is necessary first to consider an objection in limine taken by the plaintiff to the effect that the matter does not properly fall within the terms of either r. 10 or r. 24 for the reason that, as is submitted, the judgment in question was not in fact an ex parte judgment and that therefore this court has no jurisdiction to entertain the application. The circumstances leading up to the judgment may be stated shortly. The plaint was filed on May 28, 1965, and, as the defendants were not at that time within the jurisdiction, substituted service of the summons was, with leave, effected on them, and an appearance was entered by both defendants on July 21, through Messrs. Archer & Wilcock, a firm of advocates acting for them at that time.

The defendants returned to Kenya during the last week of July and the time within which they were required by law to file their defences expired during the first week of August. No defence having been filed the plaintiff's advocate, by a letter dated August 10, requested the High Court Registry to have the case set down for formal proof. The case was accordingly set down to be heard on September 21 and the Registry, on August 18, notified Messrs. Archer & Wilcock of this fact. On September 17, the defendants, through Mr. Swaraj Singh, whom they had in the meantime appointed as their advocate, filed a notice of motion for September 21, seeking an enlargement of time for filing their defences and a stay of adjournment of the hearing already fixed for that date. By an arrangement arrived at between counsel to suit the convenience of counsel for the plaintiff the date of hearing both of the action and of the motion was subsequently advanced to September 20.

The Cause List for September 20, an official copy of which was put in evidence by the plaintiff on the hearing of the application before me, showed that the matters listed on that day in Court No. 6 at 10.30 a.m., included, first, the defendants' motion and, immediately afterwards, the formal proof of the plaintiff's claim in the action. At the hearing of the motion the defendants were represented by Mr. Mackie-Robertson, Q.C., and Mr. Swaraj Singh (each of whom had been retained less than one week previously), and the plaintiff by Mr. Gautama. It would appear from the terms of the order made that the latter submitted that the defendants' motion ought to be dismissed and suggested that if the plaintiff should subsequently succeed in obtaining an ex parte judgment the defendants could apply to have it set aside. The learned judge at the conclusion of the argument dismissed the motion saying that in the circumstances of the case he did not think he should deprive the plaintiff of his right to proceed to formal

proof in default of defence and he accepted the

plaintiff's contention that if the defendants were not satisfied with such judgment (if any) as the plaintiff might obtain ex parte they could apply to have it set aside. The defendants were given leave to appeal against the dismissal of the motion and their counsel then withdrew. Subsequently, in the afternoon of the same day, the hearing of the formal proof was duly called and came on before the same judge, Mr. Gautama again appearing for the plaintiff and the defendants neither appearing nor being represented. The case for the plaintiff was formally proved to the satisfaction of the learned judge and judgment pronounced, and it is for the purpose of having his judgment set aside that the present application is brought.

On these facts counsel for the plaintiff (Mr. Gautama) now contends that the hearing at which the plaintiff's claim was formally proved was on notice to the defendants, by reason both of the hearing notice sent to their former advocates on August 18 and of the publication of notice in the Cause List, and since they had appeared by counsel and unsuccessfully moved the court for the express purpose of obtaining an adjournment, the hearing of the formal proof was not ex parte and accordingly the judgment then obtained cannot be set aside or varied by this court, except, perhaps, on review. In support of his argument he submitted that the learned judge became "seized of the formal proof" as from the commencement, on the morning of September 20, of the hearing of the defendants' motion asking for a stay or adjournment and he submitted that a test of a judgment being ex parte is whether the party against whom it is made participated in the proceedings at which it was pronounced and suggested that once a case is fixed for hearing and such party appears at or before the hearing and applies for an adjournment the hearing becomes inter partes and cannot be ex parte.

What may possibly be the simplest answer to this contention is to be found in the language of the rules themselves. Although the marginal note to O. IX, r. 10, refers to setting aside, ex parte judgments, that rule (unlike r. 24 of the same Order) is not in terms limited to the setting aside or varying of ex parte judgments as such and would appear to extend to all judgments passed pursuant to any of the preceding rules of the Order including even r. 9 (1). Not having heard a full argument on this possibility, however, I propose to decide the matter on the basis that the application of r. 10 should be restricted, as the marginal note suggests, to ex parte judgments, and the question therefore is: was the judgment which was passed in this case on the afternoon of September 20 in the absence of the defendants and of their counsel but on notice to them an ex parte judgment?

In Jowitt's Dictionary of English Law, Vol. 1, at p. 744, it is stated that "in its more usual sense, ex parte means that an application is made by one party to a proceeding in the absence of the other. Thus an ex parte injunction is one granted without the opposite party having had notice of the application. It would not be called ex parte if he had proper notice of it and chose not to appear to oppose it". Whatever truth is to be found in the latter part of that statement in relation to the granting of injunctions I am of the opinion that, generally speaking, an order which, in proceedings that are themselves inter partes, is made on the application and in the presence of one party but in the absence of the other may be correctly termed ex parte notwithstanding that the other party had notice of the application and chose not to appear. In *Wise v. Kishenkoomar and Another* (1), the Privy Council, in a case where the respondents to an appeal had not entered an appearance, directed that the appellant should be at liberty to serve due notice upon the respondents and that in the event of their not appearing the Board would "proceed to hear the case ex parte". A similar usage of the term was adopted by the Privy council in the very recent appeal from the Court of Appeal for Eastern Africa in *National and Grindlays Bank Limited v. Kentiles Limited (in liquidation) and the Official Receiver (as liquidator*

thereof) (2) when, in its judgment dated November 25, 1965, referring to the fact that the respondents did not appear, it said that “although the company and its liquidator were duly made respondents, they have not appeared on the appeal which has been argued ex parte on behalf of the Bank”. Furthermore this is the meaning which appears plainly to be contemplated by O. IX, r. 17(1)(a) of the Civil Procedure Rules.

Counsel for the plaintiff’s submission that merely by the defendants moving the court on the morning of September 20 for an adjournment the court had then become “seized of the formal proof” so that the hearing in the afternoon could not have been ex parte can also be answered by a perusal of the decision in *Satish Chandra Mukerjee v. Ahara Prasad Mukerjee* (3), where the Full Bench of five judges of the High Court of Calcutta unanimously held that an application at the hearing, made when the case was called by a pleader on behalf of a party for the purpose of obtaining an adjournment of the hearing, upon the refusal of which the applicant then withdrew, did not constitute an appearance by the party at the hearing, Harrington, J., saying:

“I do not see how a pleader can be said to attend at the hearing, merely because, before the hearing begins, he comes and asks the court that there may be no hearing. The hearing does not begin till his application is disposed of.”

That case was distinguished, but without any suggestion of disapproval by the former Court of Appeal for Eastern Africa in *Din Mohamed v. Lalji Visram & Co.* (4) upon which counsel for the plaintiff relied but in which the facts were materially different from those now before me. There the defendants had filed their defences and, on the case coming on for hearing in court on a date fixed by consent, counsel for the defendants, who had already been in the case for several months and had drafted and filed the defence, produced a medical certificate as to the illness of one of his witnesses and applied for an adjournment on the ground that, in the absence of that witness, he would be unable adequately to cross examine the plaintiff’s witnesses. Counsel for the plaintiff opposed the application which, after discussion, was refused whereupon the defendants’ counsel withdrew from the case and the hearing continued in his absence. A further point of distinction between that case and the present is that there the application to have that judgment set aside was dealt with under r. 24 of O. IX and not, as here, under the more comprehensive provisions of r. 10.

In my opinion the present case is sufficiently covered by *Mukerjee’s* case (3) and the two Privy Council decisions to which I have referred, and I must disallow the preliminary objection.

It is now necessary to turn to the principal issue between the parties, namely, the question as to whether the judgment of this court granting the plaintiff a decree for specific performance should be set aside or varied. At the hearing before me the defendants were not represented by counsel and conducted the proceedings in person, while Mr. Gautama appeared for the plaintiff. Reference was made to the note by Chanan Singh, J., of the evidence given before him by the plaintiff on the formal proof in addition to which evidence was given before me by means of a number of affidavits sworn by the parties and by the oral testimony of Mr. Place, a partner in the firm of Archer & Wilcock already referred to, who was called and examined on behalf of the plaintiff, and cross-examined by each of the defendants in turn. Before giving his evidence Mr. Place formally claimed privilege on behalf of the defendants insofar as his evidence might relate to matters arising out of instructions received by him or his firm as the defendants’ former advocates. The court thereupon explained to the defendants their position in the matter but each of them expressly waived his right to claim or rely upon such privilege, stating that they

had nothing to hide and indicating their willingness that Mr. Place should give his evidence freely. Neither the plaintiff nor the defendants were cross-examined on their affidavits.

The matter is one of some complexity and certain further facts, additional to those already mentioned, must be set out. It appears that about the month of October or November in the year 1964 the defendants, who had been farming in Kenya for many years, were in negotiation through a firm of land agents known as Dalgety & Co., Ltd., for the sale to the plaintiff of the suit premises consisting of a small farm of land of some nineteen acres in extent at Lower Kabete near Nairobi the land reference number of which is L.R. 5979, together with certain farm machinery and effects, all of which was owned by the defendants as joint tenants. A sale was agreed upon at a price of Shs. 100,000/- and Messrs. Archer & Wilcock proceeded to prepare on behalf of the defendants a draft contract. It would seem that the first draft was not sent out but was replaced by a second draft which on November 12 was forwarded by Messrs. Archer & Wilcock to Mr. N. J. Desai, the advocate then acting for the plaintiff, for his approval. A copy of this second draft was put in evidence (Ex. 12) and shows that the price of Shs. 100,000/- was made up of Shs. 95,000/- for the immovable property and Shs. 5,000/- for the movable. Shortly afterwards this draft was replaced by a third draft (Ex. 13) under which the sale was to include some household furniture at a value of Shs. 2,920/- which brought the total purchase price to Shs. 102,920/-. This draft appears, in turn, to have been replaced by a fourth draft (Ex. A) in which the total price was reduced to Shs. 102,635/-, made up of Shs. 94,000/- for the immovable property and Shs. 8,635/- for moveables including farm machinery, household furniture and effects. There is some uncertainty as to when this fourth draft was prepared and there is an allegation by the defendants that it was executed by the plaintiff, which, however, the plaintiff denies.

In the course of his evidence before the learned judge on the formal proof, the plaintiff said that his arrangement with the defendants was to be subject to his securing a loan of Shs. 100,000/- from the Land and Agricultural Bank of Kenya, and that when, sometime in December, he was informed by the bank that it was not prepared to make so large an advance he declined to sign the contract. I understood from the defendants that they did not agree that the arrangement was subject to this stipulation but the plaintiff's recollection of the bargain is supported by a letter dated December 1, 1964, written by Mr. Place to Mr. Desai recording what the writer understood to be the terms arrived at on that morning at a meeting said to have taken place between the plaintiff, the first defendant and a representative of Dalgety and Co., Ltd. These terms, as so recorded, included a provision permitting the plaintiff forthwith to enter upon the lands for the purpose of picking and processing coffee on the understanding that the agreement would be signed without delay and that in the event of the bank loan being refused he would immediately vacate the lands. It appears that the plaintiff is still in occupation of the portion of the lands which is under coffee but the precise legal position in regard thereto is not clear.

During the first week of December, 1964, the defendants left Kenya for South Africa with a view possibly to settling there, and before their departure they executed a joint power of attorney in favour of Mr. Place. Neither the original nor a copy of this power was put in evidence but Mr. Place was able to produce from his file what appears to be a draft, undated and unexecuted, which was accepted by the parties as an accurate copy of the power as it was at the time of execution. It is in the form of a general power, unlimited in time and not expressly made irrevocable, and it purports to authorise the donee *inter alia* to sell all immovable property, chattels and effects then or thereafter belonging to the defendants or either of them, to defend all actions and legal proceedings

in which the defendants or either of them may be interested or concerned, to execute, sign and enter into all such deeds and agreements as shall be requisite in relation to the affairs of the defendants or either of them and generally to act as their agents. It is noteworthy that the donee named is Mr. Place alone, and that it does not refer to him as a partner in the firm of Messrs. Archer & Wilcock or even as an advocate. No reference was made to this power either in the plaint or in the evidence on the formal proof, nor did the learned judge refer to it in his judgment, and it seems to have come to light only recently. Its relevance will be considered later.

The plaintiff's inability to obtain the desired financial accommodation from the bank brought the negotiations to a halt, but they were resumed early in January, 1965, Messrs Makhecha & Waruhiu, who by that time were acting for the plaintiff in place of Mr. Desai, writing to Messrs. Archer & Wilcock on sixth of that month enquiring as to the position. The latter replied on January 8 stating that:

"Unfortunately by reason of the valuation placed upon the property by the Land and Agricultural Bank namely £4,000, it would appear that this sale cannot proceed. Col. McConnell has written that he is not prepared to accept this figure and in fact he himself is returning to Nairobi in the near future."

Meanwhile, on January 7, the first defendant, who was also anxious to re-open negotiation, wrote to Mr. Place suggesting that a solution to the plaintiff's difficulty might be found in a reduction of the proposed purchase price to £4,000 on certain terms and he asked Mr. Place to let him know if anything could be arranged. Messrs. Archer & Wilcock apparently considered that this suggestion was to be treated as a firm proposal and communicated it as such in a letter dated January 14, to Messrs. Makhecha & Waruhiu, saying that "all other conditions would be as in the previous agreement" and adding: "In order to assist you in considering the proposal we are forwarding a copy of the agreement as originally prepared, which will of course require only slight amendments to bring it into line with the new proposals". It is not clear which of the draft agreements was enclosed with the letter.

To this communication the plaintiff's advocates replied on January 16 saying that their client was in agreement with the new proposal and returning the draft agreement "with a request to prepare new agreement in pursuance of the above letter and forward to us for our approval". The defendants' advocates thereupon prepared a draft agreement showing the purchase price at Shs. 88,635/- and on January 19 forwarded it as an engrossment, together with a counterpart to the plaintiff's advocates for execution. The latter, however, in their letter of January 21 stated that the terms of this agreement were acceptable to their client only subject to certain alterations whereupon Messrs. Archer & Wilcock wrote to the first defendant for further instructions. In a reply dated February 2, the first defendant said: "We would accept (subject to confirmation on hearing from you) £4,000 for the farm, including tools and equipment, coffee crop, and furniture Shs. 2,635/-. These amounts to be paid in sterling". Later in the same letter he added: "On hearing from you I will telegraph acceptance or otherwise". The defendants' advocates thereupon wrote on February 8 to the plaintiff's advocates in the following terms:

"Further to our letter of February 3 we have now heard from our clients who state as follows: They will accept Shs. 80,000/- for the farm including tools equipment and coffee crop and Shs. 2,635/- for the furniture making a total purchase price of Shs. 82,635/-. The position therefore is that on payment of this sum, subject of course to the Land Bank Loan and Divisional Board Consent, our client will convey the property to Mr. Kimani but the

rents of the house which is let will, as previously stated, be payable to our clients until December 31 this year.

We shall be grateful for your clients comments.”

The plaintiff’s advocates replied to this letter on February 10, saying:

“We are pleased to inform that our client is prepared to accept the total price of Shs. 82,635/-.

We enclose herewith Agreements for sale for necessary amendments and return to us for execution by our client.”

Copies of these two letters were not sent to the defendants and without their knowledge their advocates on February 16, sent to the plaintiff’s advocates two fresh copies of a fresh agreement engrossed for signature, requesting that the plaintiff should sign them, which the plaintiff accordingly did, after which, his advocates, on February 18, returned them to the advocates for the defendants who in turn forwarded them to the defendants for signature. The defendants, in reply, immediately informed their advocates, by letter dated March 2, that the agreement as prepared was unauthorised, pointing out that their instructions on February 2 had been that any agreement to be entered into should be conditional upon their confirmation by telegraph and also that payment of the purchase price was to be in sterling, a provision which was omitted from the agreement, and stating that the defendants were definitely not agreeable to sell the property on such terms. They declined to execute the agreement and also declined to execute a formal assignment of the property subsequently prepared by the advocates for the purchaser, and neither instrument was ever executed by the defendants.

In the course of his evidence Mr. Place explained that the reason why the draft contract sent to the plaintiff’s advocates on January 19, showed the purchase price at Shs. 88,635/- was because he was not clear in his own mind as to whether the intention was that the plaintiff was to pay a sum of Shs. 6,000/- for certain tools and he gave the defendants what he called “the benefit of the doubt” by including that amount in the purchase price. He further said that when writing to the plaintiff’s advocates in the terms of his firm’s letter of February 8 he considered that he was authorised so to do as the correspondence which had passed between the two firms of advocates during the month of January constituted, in his view, a binding contract subject only to settling the question as to whether the purchase price was to include the tools. This letter is, of course, of vital importance in the case, for the plaintiff, by his advocates’ letter of February 10, purported to accept the offer there put forward and his entire claim in the action springs from the agreement which he says arose from the offer and acceptance contained in those two letters.

I should say here that in my opinion Mr. Place was mistaken in thinking that the prior correspondence had created a binding contract between the parties or that he had the authority of either of the defendants to cause his firm to write the letter of February 8. That letter was expressed to be written “further to our (that is, Messrs. Archer & Wilcock’s) letter of February 3”, to the plaintiff’s advocates and as a result of later instructions. The only later instructions received were those contained in the letter of February 2 in which the first defendant, writing on behalf of himself and his wife, expressly imposed the condition that any offer made was to be subject to their prior acceptance.

Counsel for the plaintiff also sought to rely upon the power of attorney previously given to Mr. Place. The letter of February 8, however, as was the case with all the correspondence addressed to the plaintiff’s advocates, was clearly written by Messrs. Archer & Wilcock acting as the advocates for the defendants and not as advocates for Mr. Place their attorney. If the negotiations at that

stage were being conducted by the latter as a general agent under his power of attorney one would have expected to find the correspondence with the plaintiff's advocates being carried on either by him in person or by Messrs. Archer & Wilcock as his advocates. Furthermore, as I have already said, the power of attorney was not relied upon by the plaintiff before the learned judge nor is it mentioned in the plaint, and it would be improper for me to have regard to it at this stage further than to treat it as possibly raising a further triable issue between the parties.

Although the facts are readily distinguishable the test to be applied here is not unlike that in *H. Clark (Doncaster) Ltd. v. Wilkinson* (5), where the Court of Appeal in England, in giving leave to a defendant to defend in an action for specific performance of what purported to be an agreement for sale of premises signed on his behalf by his solicitor said, in the words of Lord Denning, M.R. ([1965] 1 Ch. at p. 702):

"It was acknowledged to be law before us that a solicitor has no ostensible or apparent authority to sign a contract of sale on behalf of a client so as to bind him when there is no contract in fact. An auctioneer, it was said, has ostensible authority, but a solicitor has not. It would seem, therefore, that if the defendant is to be bound by his contract, then the buyer has to prove that the solicitor had authority *in fact* to sign it. Now here the defendant swore on oath an affidavit that his first solicitor had no such authority. That disclosed a triable issue such as to entitle him to leave to defend in the action."

In the present case the plaintiff seeks to set up a contract arising out of an offer contained in Messrs. Archer & Wilcock's letter of February 8. The defendants deny the authority of their advocates to write the letter and since the onus of establishing that they had such authority is on the plaintiff, there is clearly a triable issue between them.

A second matter which may well give rise to an issue to be tried is the fact that the parties appear to have negotiated at all times on the basis that any arrangements come to were subject to the terms being reduced not only to writing, but to a formal contract to be signed by them. A least four separate drafts of this contract seem to have been prepared during the months of November and December, 1964, and in their letter of January 16, 1965, the plaintiff's advocates indicated that they still required a formal contract. In this connection counsel for the plaintiff referred me to a passage from Cheshire and Fifoot's *Law of Contract* (6th Edn.) at p. 34 and to the decisions in *Branca v. Cobarro* (6) and *Rossiter v. Miller* (7), but there is nothing in those authorities to justify the court in declining to give due weight, if so required, to the manifest intention to be gathered from the course of conduct of the parties and of their advocates. It is not necessary for the purpose of this application that I should determine expressly that the parties were agreed that their negotiations were conditional upon their being reduced to the form of a written contract. All that is required is that I should be satisfied that there is clearly a triable issue as to this if the point should be taken, and upon that there can be no doubt.

It thus appears that each of these two matters, the authority of the defendant's advocates to write the letter of February 8 and the apparent intention of the parties that any arrangements come to between them or their respective advocates should not create a contractual relationship until reduced to a formal agreement duly signed, would constitute a triable issue between the parties and (although the former was mentioned on the hearing of the application for enlargement of time for filing defences) neither was raised before or adjudicated upon by the learned Judge when dealing with the suit on formal proof. A decision in favour of the defendants upon either of these issues might well have resulted in the action

being dismissed, and the absence of consideration of these two matters therefore constitutes a material factor in the passing of the judgment which would almost certainly have been avoided had the hearing not been ex parte.

A plaintiff who, finding that the defendant has entered an appearance but has failed to file a defence within time, elects to proceed to judgment under O. IX, r. 9 (2) does so at the risk involved in the possibility of the court subsequently, under rr. 10 or 24 of the same Order, setting aside or varying such judgment. Clearly if he has no reason to suppose that the defendant will seek to have the judgment set aside or varied or if he knows that the defendant has no valid defence to the suit the risk is minimal, but where, as here, the plaintiff in order to obtain his judgment on formal proof has first to defeat an application to the court by the defendant for liberty to file a defence out of time the risk which he undertakes may be substantially increased. It would not perhaps be easy to define with exactitude the several considerations to which the court may properly have regard in dealing with an application under O. IX, r. 10, but it was submitted for the plaintiff that a defendant seeking such relief must show, in the first place, that he was prevented from taking the step in default of which the ex parte judgment was granted and, in the second place that he has a good defence to the suit, and subject thereto, that the test in general is similar to that applicable to an application for leave to file a pleading out of time save that regard should be had to the fact of the plaintiff having, by means of the judgment, acquired a vested right. No authority was cited in support of this proposition and in my opinion it is somewhat too widely stated. The reference to the defendant having been prevented from taking the proper steps appears to come from r. 24, but that rule makes it mandatory upon the court, in a proper case, to set aside the ex parte decree, whereas r. 10 makes no reference to the defendant having been so prevented and confers upon the court what would appear to be an absolute discretion to be exercised judicially in the light of the facts, circumstances and merits of the particular case.

Looking at O. IX as a whole, and attempting to comprehend the purpose of rr. 10 and 24, it seems to me that a reasonable approach to the application of these rules to any particular case would be for the court, first, to ask itself whether any material factor appears to have entered into the passing of the ex parte judgment which would not or might not have been present had the judgment not been ex parte, and then, if satisfied that such was or may have been the case, to determine whether, in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties, it would be just and reasonable to set aside or vary the judgment, if necessary, upon terms to be imposed.

I now turn to the question as to whether in the circumstances of the present case this court, in the light of all the facts before it and in the proper exercise of its discretion, should set aside or vary the terms of the judgment. Perhaps because that discretion is so wide there would appear to be a paucity of authority upon the matter. I understood counsel for the plaintiff to agree that generally speaking the discretion might properly be exercised on lines somewhat similar to those adopted in *Gatti v. Shoosmith* (8), due allowance being made for the fact that, as the holder, the plaintiff already has a vested interest in the ex parte judgment. In that case, however, the court referred, apparently with approval, to the view of Scrutton and Atkin, L.JJ., in *Wood v. Manchester Corporation* (9) (unreported, but mentioned in the 1939 Annual Practice at p. 1283) that the “vested interest” argument no longer carried the same weight as formerly, and it seems to me that a fortiori in a case such as the present a judgment obtained ex parte under O. IX, r. 9 (2) would scarcely create a “vested interest” of any substance.

During the hearing before me several matters were raised upon which it is not necessary for me to express an opinion and the features of the case which seem to merit consideration are the following:

- (a) there appears to be one or more than one triable issue between the parties which was not referred to at the formal proof and which, if decided in favour of the defendants, would or might defeat the plaintiff's claim in the suit;
- (b) immediately prior to the passing of the judgment sought to be set aside the defendants, being then out of time for filing their defences, made a bona fide application to the court for leave to file their defences and to stay the hearing of the formal proof;
- (c) that application was resisted by the plaintiff and was dismissed;
- (d) the arguments put forward by the plaintiff in resisting the application included the submission that, in the event of the judgment now sought to be set aside being passed, the defendants would be able to apply to the court to have it set aside, which submission the judge appeared expressly to accept;
- (e) the period by which the defendants were out of time in filing their defences was, at the date of the plaintiff's request to have the matter set down for formal proof, some five or six days only and, at the date of the passing of the judgment, between six and seven weeks;
- (f) the circumstances that had led to the present position between the parties cannot, in fairness, be attributed solely to the defendants personally;
- (g) no irreparable injury appears likely to result to the plaintiff, in the event of the judgment being set aside, which cannot effectively be provided against by the order of the court.

Taking all these matters into account and endeavouring to apply the principles which I have ventured to state I am of the opinion that the judgment dated September 20, 1965, should be set aside in its entirety upon such terms as may be just. I will now hear the parties as to the terms including costs.

Application allowed, ex-parte judgment set aside on condition that defence filed within 28 days.

For the plaintiff:

Satish Gautama, Nairobi

The defendants appeared in person.

Ali Mukibi v Ambalal V Bhavsar
[1966] 1 EA 557 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	18 November 1966
Case Number:	97/1964
Before:	Sir Udo Udoma CJ
Sourced by:	LawAfrica

[1] *Tort – Cause of action – Injury to reversion of hired chattels – Whether action on the case would lie – Nature of damage on which to found case.*

[2] *Pleading – Cause of action – Injury to reversion on hired chattels – Whether cause of action disclosed – Civil Procedure Rules, O. 6, r. 27 and O. 7, r. 11 (U.).*

Editor's Summary

The defendant objected in point of law that the plaint disclosed no cause of action where it alleged that the defendant had wrongfully removed chattels let by the plaintiff on hire to tenants who were not parties to the suit. The plaint gave particulars of damage for loss of rent and for the value of the articles removed to the detriment of the plaintiff's reversion.

Held –

- (i) on these facts possession lay with the tenants and trespass, detinue and trover could not lie at the instance of the plaintiff;
- (ii) removal of the goods from the tenants by itself was insufficient to constitute an action on the case, although such an action would lie if temporary or permanent damage to the reversion was pleaded.

Preliminary objection upheld. Plaint rejected.

Cases referred to in judgment:

- (1) *Tancred v. Allgood* (1859), 157 E.R. 910; 4 H. & N. 438.
- (2) *Sullivan v. Osman*, [1959] E.A. 239 (C.A.).
- (3) *Ferguson v. Cristall and Another*, 5 Bing. 304; 130 E.R. 1078.
- (4) *Strand Electric and Engineering Co. Ltd. v. Brisford Entertainments Ltd.*, [1952] 1 All E.R. 796.
- (5) *Gordon v. Harper* (1796), 7 T.R. 9; 101 E.R. 828.
- (6) *Mumford and Others v. The Oxford, Worcester and Wolverhampton Railway Co.* (1856), 1 H. & N. 34.
- (7) *Baxter v. Taylor* (1832), 4 B. & Ad. 72; 110 E.R. 382.
- (8) *Donald v. Suckling* (1866), L.R. 1 Q.B. 585.

Judgment

Sir Udo Udoma CJ: When this suit came up for hearing on November 2, 1966, counsel for the plaintiff drew the attention of the court to the preliminary objection in point of law pleaded in paras. 2 and 3 of the defendant's written statement of defence filed in answer to the plaintiff's plaint, and applied that, as the objection was an important point of law, it should first be disposed of by the court.

Counsel for the defendant did not oppose the application. He indicated to the court that he was prepared to argue the point forthwith. In the circumstances and having regard to the provisions of O. 6, r. 27 of the Rules of this court, I granted the application and invited counsel to argue the preliminary point of law raised in the defence.

This suit has been instituted by the plaintiff, Ali Mukibi, against the defendant, Ambalal Vallavdas

Bhavsar. The claim is based on a wrongful removal of certain goods over which the plaintiff claims ownership.

For the proper appreciation of the issue of law which was raised and argued by counsel, it would be convenient, I think, to set out in extenso the relevant paragraphs of both the plaint and the statement of defence concerned. I consider that, for the purpose of the objection argued before the court, the relevant parts of the plaint are the averments contained in paras. 3, 4 and 5, which are as follows:

- “3. The plaintiff is and was at all material times the owner of property comprised in the document annexed hereto marked ‘A.M.1’.
4. On or about December 12, 1961, the plaintiff let the said goods on hire with the plaintiff’s building situate at Nyando, Mutuba III, Buddu, Masaka District to one Deziranta Nakanwagi and Peter Sebowa for one year. At all material times the said Deziranta Nakanwagi and Peter Sebowa were in possession of the said goods specified in ‘Annexe A.M.1’ and the reversionary interest therein was vested in the plaintiff.
5. On or about January 16, 1962 at Masaka the agent or servant of the defendant wrongfully removed the goods specified in ‘Annexe A.M.1’ whereby the plaintiff’s reversionary interest therein has been injured and the plaintiff has suffered loss and damage.

Particulars of Damage

(a) Loss of rent at Shs. 300/- per month from January 12, 1962 to December 11, 1962	Shs. 3,300/-
(b) Value of articles specified in ‘Annexe A.M.1’ taken	5,000/-
	Shs. 8,300/-.”

In answer to paras. 3, 4 and 5 of the plaint set out above, the defendant had pleaded in paras. 2 and 3 of his defence as follows:

- “2. The plaint as framed does not disclose a cause of action against the defendant because all the necessary ingredients to support an action for injury to the reversionary property and interest in the goods so seized and referred to in the annexure ‘AM’ to the plaint have not been pleaded in the instant case, and hence the defendant submits that the plaint be rejected with costs to the defendant.
3. On the facts as pleaded in the plaint the plaintiff cannot sue the defendant for enforcement of his reversionary interest in the goods so seized.”

In his submissions, counsel for the defendant contended that the plaint as framed does not disclose a cause of action against the defendant; that the action being founded on tort the plaintiff could not maintain any action in detinue or conversion against the defendant, because at the material time when the goods are alleged to have been removed, the plaintiff was not in possession of them. It was both Deziranta Nakanwagi and Peter Sebowa who were in lawful possession of the goods.

On the pleading in the plaint on January 1, 1962, when the goods were said to have been removed, the plaintiff had already lawfully parted with the possession of the goods and could not in those circumstances, it was submitted, maintain an action of trespass against the defendant since on the averments on the plaint, the plaintiff was then only entitled to a reversionary interest in the goods.

Counsel further contended that before any person entitled at the material time to only a reversionary interest in a chattel can maintain an action against a third party, he must aver in his plaint and prove that his reversionary interest has

suffered actual and permanent damage or has been completely destroyed; and that the plaintiff failed to aver that by the alleged wrongful removal the plaintiff's reversionary interest has either been damaged or destroyed; and therefore counsel submitted that the writ does not disclose a cause of action and should be rejected. The court was then referred to *Tancred v. Allgood* (1), *Sullivan v. Osman* (2) and *Ferguson v. Cristall and Another* (3). Counsel finally submitted that under O. 7, r. 11 of the Rules of this court the plaintiff should be rejected.

Counsel for the plaintiff submitted that, while he conceded that on January 16, 1962, when the goods were wrongfully removed the possession of the said goods was in Deziranta Nakanwagi and Peter Sebowa, nevertheless the plaintiff's action was not based on trespass, or detinue or conversion but on wrongful removal of the goods without the plaintiff's consent. This part of the submission of counsel for the plaintiff was somewhat obscure and therefore not too clear to me.

Counsel then referred the court to precedent 24 at p. 319 of *The Encyclopaedia of Forms and Precedents* (1st Edn.) Vol. 15, pp. 303 and 304, and submitted that in his plaintiff he had followed that precedent, which deals with claims by reversioners. Finally counsel contended that on the authority of *Strand Electric and Engineering Co. Ltd. v. Brisford Entertainments Ltd.* (4), the plaintiff has disclosed a cause of action; that the action was maintainable in law; and the objection should be overruled.

I think it is a generally accepted principle of law that to maintain an action of trespass to goods, the plaintiff must have been in possession of the goods at the time of the trespass. For trespass to goods like trespass to land is essentially an injury or disturbance to possession and not to ownership. An owner of goods, therefore, cannot maintain an action of trespass to such goods if his right of possession to the said goods is suspended at the time of the trespass. His right of possession may be suspended in at least three instances, namely:

- (1) if he has pledged goods to someone else and thereby parting with the possession thereof – or
- (2) if he has let the goods on a contract of hiring – or
- (3) if the goods are in the possession of someone who has a lien on them against the true owner.

While it is correct to say that an owner of goods cannot maintain an action of trespass to goods of which he is not in possession, I think, nevertheless, it is also true to say that even in such circumstances he can maintain such an action if he is entitled to the reversionary interest in the goods for any permanent injury to the goods, which has of necessity affected his reversion. Such an owner is also entitled to bring a special action on the case if by such an act of trespass he is permanently deprived of the benefit of his reversionary interest.

Now, the objection raised in this case is that the plaintiff does not disclose a cause of action because in his plaintiff dated February 17, 1964, the plaintiff has pleaded that on January 16, 1962, when the goods covered by annexure A.M.1 were allegedly wrongfully removed, he was not himself then in possession of the goods, the same having been let on hire, together with his building, to Deziranta Nakanwagi and Peter Sebowa, who incidentally are not parties to this action. The plaintiff has also admitted that he had only then a reversionary interest in the goods.

The question, therefore, is: on the face of the plaintiff is any cause of action disclosed?

In para. 5 of the plaintiff the plaintiff alleges that by the wrongful removal of the goods his reversionary interest therein has been injured and that he has, therefore, suffered loss and damage. Such loss and damages are particularised

as loss of rent at Shs. 300/- per mensem from January 1, 1962 to December 11, 1962; and the value of the articles allegedly wrongfully removed. It is, however, not clear how a mere removal of goods (to God knows where) which at the time were not in the possession of the plaintiff but in the possession of Deziranta Nakanwagi and Peter Sebowe, who may rightly be described as the tenants of the plaintiff, could cause injury to the plaintiff. It is not alleged in the plaint that such an alleged wrongful removal had resulted in permanent or temporary damage or destruction of such goods to the prejudice of the plaintiff's reversionary interest.

When the attention of counsel for the plaintiff was drawn to this aspect of the matter, the court, as already stated, was referred to The Encyclopaedia of Forms and Precedents, Vol. 15, at p. 319, and from 24 therein printed. Counsel for the plaintiff had then submitted that his plaint was based on precedent 24 and therefore was in order and disclosed a good cause of action against the defendant.

I have myself examined the particular precedent 24 and compared it with the plaint filed in this suit. In para. 3 of the precedent is to be found the essential ingredients and averments in a claim for injury to reversionary interest; and the paragraph corresponds to para. 5 of the plaint concerned in this case.

The averments contained in para. 5 of the plaint have already been set out in detail in these proceedings, but at the risk of repetition and to facilitate comparison between the two pleadings, I am again reproducing para. 5 of the plaint and the corresponding para. 3 of precedent 24.

Paragraph 5 of the plaint reads as follows:

"5. On or about January 1, 1962, at Masaka the agent or servant of the defendant wrongfully removed the goods specified in 'Annexe A.M.1' whereby the plaintiff's reversionary interest therein has been injured and the plaintiff has suffered loss and damage."

Particulars of Damage

	Shs.
(a) Loss of rent at Shs. 300/- per month from 12.1.62 to 11.12.62	3,300/-
(b) Value of articles specified in "Annexe A.M.1" taken	5,000/-
	<hr/> Shs. 8,300/-."

Paragraph 3 of precedent 24 at p. 320 is in the following terms:

"3. On or about . . . day of . . . 19 . . . at . . . the defendant wrongfully [struck and damaged, destroyed (or as the case may be)], the said (goods) whereby the plaintiff's reversionary interest therein has been injured and the plaintiff has suffered loss and damage."

It would be observed that the essential ingredients to ground an action on the case for an injury to a reversionary interest are enclosed within the brackets of para. 3 of precedent 24. It should also be noted that the words used therein are "struck and damaged, destroyed". None of those essential words appear in para. 5 of the plaintiff's plaint. Furthermore, in the footnote "O" in p. 319 of Forms and Precedents the pleader is referred to the notes in pp. 303 and 304, in which it is clearly stated that the owner of goods not in possession at the time when trespass is committed on such goods can only bring an action if he has been actually *deprived of such goods permanently or temporarily* for the benefit of his reversionary interest and that he *must prove damage to such goods* to be able to succeed. For such an action, unlike the action of trespass, is in origin an action on the case and proof of damage therefore was and is still essential.

I have also examined *Strand Electric and Engineering Co. Ltd. v. Brisford Entertainments Ltd.* (4), which was the other authority cited and relied upon by counsel for the plaintiff. It is unnecessary to deal with this case in detail. Suffice it to state that it was an action in detinue and the real point of contest in the case was as to the measure of damages. The case is, therefore, irrelevant to the issue and circumstances under consideration in the instant case. It appeared somewhat surprising though that counsel for the plaintiff, who rightly I think, previously had contended that his action in the instant case was neither trover nor detinue, nor conversion, should have relied for the purpose of establishing his submission on an action which was plainly founded on detinue.

In support of his submissions counsel for the defendant cited and relied on *Dame Harriet Lucy Tancred v. Allgood* (1). I propose to examine this case at this stage. *Tancred v. Allgood* (1) was heard in 1859 and according to the old system of practice in those days there were two counts as follows:

First Count: That at the time of the commission of the grievances the plaintiff was the owner and proprietor of certain goods, which had been and were let on hire, for a term unexpired, to one Sir Thomas Tancred, who then had the use and possession under such letting; the reversionary property, estate and interest in the said goods belonging to the plaintiff, when the defendant, well knowing the premises, wrongfully seized and took the said goods out of the possession of Sir Thomas Tancred, and absolutely sold the said goods, and converted and disposed thereof, and dispersed them so as to prevent the same being followed or found, whereby the plaintiff was injured in her reversionary estate in the goods.

Second Count: Similar to the first, except that it alleged that the goods were let to Sir Thomas Tancred "to be used in a certain house and not otherwise or elsewhere; that Sir Thomas Tancred had the use of the goods, subject to the expiration of the term, by the violation of the terms thereof" whereby the plaintiff was injured in her reversionary estate in the goods.

Pleas by the defendant:

"That the defendant seized and took the goods, not in market overt, but as sheriff under a writ of fieri facias against Sir Thomas Tancred, and that the plaintiff had not sustained and would not sustain any damage by reason of the premise."

Demurrer and joinder.

It was held by the court that, as the damage sustained by the plaintiff was the foundation of the action, the pleas were an answer to the action.

In the judgment of the court, Pollock, C.B., said (157 E.R. at p. 913):

"In this case the damage sustained by the plaintiff is the whole foundation of the action. Probably any temporary damage done while the plaintiff's possession was suspended by her contract with another person, is not the foundation of the action. There is an allegation in the plea which is confessed by the demurrer, that no damage has been sustained, or can be sustained. We think, therefore, that the defendant is entitled to judgment on the demurrer to the plea to the first count. The second count does not show or allege that, by reason of the use of the goods beyond the apparent licence to use them during the letting, there was a determination of the bailment so as to give plaintiff a present right to the possession. To that count there was also a similar plea and the same remark applies to that, viz., that the damage is the sole foundation of action upon the breach of the bailment. We are of opinion that the pleas are an answer to the cause of action as presented by

the plaintiff in his declaration. Our judgment must therefore be for the defendant.”

There are a number of other cases dealing with the rights of a reversioner to institute proceedings in respect of his reversionary interest; but I would content myself with referring to one or two of them.

In *Gordon v. Harper* (5), it was held that where goods leased as furniture with the house have been wrongfully taken in execution by the sheriff, the landlord cannot maintain trover against the sheriff pending the lease, because to maintain such an action he must have the right of possession as well as the right of property at the time.

There Briscoe was in possession of a mansion house at Shoreham and of the goods in question, being the furniture of the said house, as tenant of the house and furniture to the plaintiff under an agreement made between the plaintiff and Briscoe, for a term which at the trial of the action was not expired. The goods concerned were on October 24, 1795, taken in execution by the defendant, then sheriff of the County of Kent, by virtue of a writ of testatum fieri facias issued on judgment at the suit of Broomhead and others, executors of J. Broomhead (deceased) against one Borret, to whom the goods in question had belonged, but which goods, previous to the agreement between the plaintiff and Briscoe, had been sold by Borret to the plaintiff. The defendant after the seizure sold the goods. The question was, whether the plaintiff was entitled to recover in an action of trover.

The court of first instance found a verdict for the plaintiff, subject to the opinion of the court on the law. On the matter coming before the court Lord Kenyon, C.J., said:

“The only point for consideration of the court in the case of *Ward v. Macauley* (1791) 4 T.R., was whether in a case like the present, the landlord could maintain an action of trespass against the sheriff for seizing the goods, let with a house, under an execution against the tenant, and it was properly decided that no such action could be maintained. The true question is, whether when a person has leased goods in a house to another for a certain time, whereby he parts with the right of possession, during the term to the tenant, and has only a reversionary interest, he can notwithstanding recover the value of the whole property pending the existence of the term in an action of trover. The very statement of the proposition affords an answer to it. If, instead of household goods, the goods he had taken had been machines used in manufacture, which had been leased to a tenant, no doubt could have made but that the sheriff might have seized them under an execution against the tenant, and the creditor would have been entitled to the beneficial use of the property during the term: the difference of the goods then cannot vary the law. The cases which have been put at the Bar do not apply: the one on which the greatest stress was laid was that of a tenant for years of land whereon timber is cut down, in which case it was truly said, that the owner of the inheritance might retain trover for such timber notwithstanding the lease. But it must be remembered that the only right of the tenant is to the shade of the tree when growing and by the very act of felling it his right is absolutely determined; and even then the property does not vest in his immediate landlord; for if he has only an estate for life, it will go over to the owner of the inheritance. Here even the tenant’s right of possession during the term cannot be revested by any wrongful act, nor could it be revested in the landlord. I forbear to deliver any opinion as to the remedy the landlord has in this case, not being at present called upon so to do: but it is clear that he cannot maintain trover.”

In *Mumford and Others v. The Oxford and Wolverhampton Railway Co.* (6) it was held that in order to entitle a reversioner to maintain an action for injury to his reversion, it is necessary that the wrong complained of should be in its nature permanent. And further that a reversioner could not maintain an action against a railway company for making loud hammering noises in a shed adjoining his house, by reasons whereof the tenant quitted, though it appeared that he was afterwards unable to let the house except at a lower rent.

To sum up, I think it is clear from the principles established in the above cited cases that: a reversioner cannot sue unless by reason of the conversion or trespass he had been actually deprived permanently or temporarily of the benefit of his reversionary interest. In order to give a right of action to a reversioner the injury must be of a permanent character. It was so laid down in *Baxter v. Taylor* (7). See also *Donald v. Suckling* (8).

Thus he can sue if the chattel has been destroyed, or if it has been so disposed of that a valid title to it has become vested in a third party or person, as by sale in market overt. He can also sue if his reversionary interest has fallen into possession or if the chattel has been completely destroyed whereby his reversion is injured. But while his interest remains reversionary, in my view, he cannot maintain an action merely because the chattel has been wrongfully taken or detained from him who is entitled to the immediate possession of it.

Applying these principles to the instant case and having regard to the averments contained in para. 5 of the plaint, I hold that the plaint does not disclose a cause of action. It is nowhere in the plaint averred that the alleged wrongful removal of the goods the subject matter of the suit, had resulted in the destruction of the same, or that by such alleged wrongful removal the plaintiff has been permanently or even temporarily deprived of his reversionary interest in the goods or that the goods themselves have suffered any injury likely to affect his reversionary interest.

In the plaint the plaintiff makes it quite clear that all he had in the goods at the material time was a reversionary interest; that he had himself let the goods on a contract of hiring; that at the time of the alleged wrongful removal he was not in possession of the goods; and that it was one Deziranta Nakanwagi and Peter Sebowa who were in possession of the goods, pursuant an unexpired contract of hire executed between him and Deziranta Nakanwagi and Peter Sebowa.

In the circumstances and for the above reason, I uphold the objection raised by counsel for the defendant, and argued by both counsel, and rule that the plaint does not disclose a cause of action and that the same be rejected. It is accordingly rejected by virtue of the power vested in the court under O. 7, r. 11 of the Rules of this court. Costs of this ruling to the defendant.

Preliminary objection upheld. Plaint rejected.

For the plaintiff:

S. V. Pandit, Kampala

For the third party:

Patel & Dave, Kampala

R. S. Dave

Runda Coffee Estates Ltd v Ujagar Singh
[1966] 1 EA 564 (CAN)

Division: Court of Appeal at Nairobi
Date of judgment: 16 December 1966
Case Number: 8/1966
Before: Sir Charles Newbold P, Duffus Ag VP and Law JA
Sourced by: LawAfrica
Appeal from: The High Court of Kenya, Chanan Singh, J.

[1] Estoppel – Equitable estoppel – Recovery of possession of house built by licensee – Whether compensation payable by successor of licensor to successor of licensee – No clear representation to licensee’s successor.

[2] Licence – Licence to build and occupy house and shop – Whether coupled with an equity – Whether revocable without payment of compensation – Whether binding between successors of grantor and grantee.

[3] Land – Expenditure on land of another pursuant to licence – Whether successors bound by an obligation annexed to the ownership but not amounting to an interest – Indian Transfer of Property Act, 1882, s. 40.

[4] Equity – Expenditure on land of another in expectation of being allowed to stay – Whether coupled with a licence – Whether compensation payable on successor of grantee yielding possession to successor of grantor.

Editor’s Summary

The plaintiff, as freehold owner of a farm, sued for possession of a combined shop and house erected on it in stone some 10 years previously by and at the expense of the defendant’s father. As eldest son the defendant occupied the premises continuously before and after his father’s death in 1962. The defendant relied on contractual licence to build and remain in exclusive possession until compensation was paid according to a formula agreed verbally between his father and the managing director of the plaintiff’s first predecessor in title.

The terms of the licence were recorded in English, which neither the defendant nor his father could speak, at a meeting attended by the plaintiff’s second predecessor, after the building was complete, in December, 1955, but before the second predecessor became the registered owner. The minutes of that meeting were ambiguous as to whether the licence was personal to the father or would continue until compensation was paid or until the farm was sold. A sale of the land with notice of the right to compensation to the plaintiff’s third predecessor took place in 1963. The third predecessor sold the land with notice of the obligation to the plaintiff in 1964. The defendant also pleaded that the plaintiff was equitably estopped from terminating the licence without compensation founded on the father’s incurring

expense in the expectation of being allowed to stay. The trial judge awarded possession on payment of compensation to the estate of the father, holding that the obligation to pay compensation was enforceable under s. 40 of the Transfer of Property Act. On appeal it was argued for the appellant that the licence was personal to the father or by his own terms was overreached on the first sale of the farm in 1956 and that there was no clear representation that could found an estoppel in favour of the son in addition to the father. The respondent argued that the licence by its terms was irrevocable until compensation was paid and that this contemplated the father's successors being able to enforce the licence to the extent permitted by s. 40 of the Transfer of Property Act. The respondent also contended that notice to the plaintiff of the liability to pay compensation together with an equity based on the costs of the building and improvements incurred with the expectation of being allowed to stay made it inequitable for the plaintiff to recover possession without paying compensation at the rate previously agreed.

Held –

- (i) as a matter of fact the licence was personal to the father and any equitable estoppel that could arise was only in favour of the father and not the respondent;
- (ii) if the benefit of the liability to compensation could devolve to the respondent by operation of law and by the fact of possession it amounted to an interest in land not a licence, and s. 40 of the Transfer of Property Act could not apply.

Appeal allowed.

[**Editorial Note:** the law relating to a licence coupled with an equity was reviewed in the judgment of the court below.]

Cases referred to in judgment:

- (1) *Ramsden v. Dyson* (1866), L.R. 1 H.L. 129.
- (2) *Nurdin v. Lombank*, [1963] E. A. 304 (C.A.).
- (3) *Balwant v. Kipkoech*, [1963] E.A. 651 (C.A.).
- (4) *Century Automobiles Ltd. v. Hutchings Biemer Ltd.*, [1965] E.A. 304 (C.A.).
- (5) *Inwards v. Baker*, [1965] 1 All E.R. 446.
- (6) *Hopgood v. Brown*, [1955] 1 W.L.R. 213.
- (7) *Errington v. Errington*, [1952] 1 All E.R. 149.
- (8) *Coleman v. Foster*, 156 E.R. 1108.
- (9) *Wallis v. Harrison*, 150 E.R. 1543.

The following judgments were read:

Judgment

Sir Charles Newbold P: In 1950 Mr. Pichot, the managing director of St. Benoist Plantations Limited, which was the owner of a coffee estate (hereinafter referred to as the farm) gave to Cheta Ram (hereinafter referred to as the father) permission to build a combined shop and house on a plot of land within the farm. There was some dispute as to the terms of this licence but the trial judge found the terms to be as follows:

“I find that the shop and residence were built by the defendant’s father on the understanding that he would be allowed to continue to live and trade on the farm until his licence was terminated. The licence could be terminated by notice either by the licensor or, in the case of a sale of the farm, by the new owner. There was to be no automatic termination on a sale. There was no limit on the power of the licensor or his successor in title to terminate the licence. On a termination the licensee was to be paid compensation equal – in the case of termination after five years – to his cost less 10%.”

In 1956, by a conveyance registered on February 4, 1956, the St. Benoist Plantations Limited sold the estate to Cheleta Limited. At the time of, or shortly before, the sale the father was informed by or on behalf of the vendor and the purchaser that any claim which he might have for compensation should be

made against St. Benoist Plantations Limited or against Mr. Pichot and that he was only entitled to remain on the farm with the consent of the purchaser. The father continued to stay on the farm apparently in the same manner as previously. The trial judge found that the purchaser – Cheleta Limited – had actual notice of the contractual obligation for the payment of compensation. In 1956 the father expended sums of money in having electricity and water laid on to the building. As regards the expenses of the electricity the defendant gave evidence that the directors of Cheleta Limited stated that that expenditure would be reimbursed when compensation for the building was paid, but he gave no similar evidence in relation to the cost of laying on the water. The then manager of the estate, who gave evidence on behalf of the defendant,

stated that the father was allowed to lay water and electricity to the building at his own cost. The trial judge made no finding that anyone had agreed to reimburse the father the expenses of the installation of electricity and water.

In 1962 the father died without leaving a will, but his son, the defendant in the High Court and the respondent in this court, continued to live on the premises and to carry on his father's business. Letters of administration of the estate of the father were granted to his son, the defendant, on March 2, 1966, a date subsequent to the filing of this appeal.

In 1963, by a conveyance registered on October 17, 1963, Cheleta Coffee Plantations Limited purchased the farm from Cheleta Limited. The judge found that the purchaser had actual notice of the contractual obligation for the payment of compensation. Some discussion had taken place between the purchaser and the defendant with regard to the position of the defendant and he had been informed by letter that there was no agreement with the purchasers which permitted him to occupy the building. The defendant, however, continued to reside in the building and to carry on his business.

In 1964, by a conveyance registered on December 15, 1964, Cheleta Coffee Plantations Limited sold the farm to Runda Coffee Estates Limited, who were the plaintiffs before the High Court and the appellants in this court. The judge found that the plaintiffs had actual and constructive notice of the contractual obligation for the payment of compensation. Before the plaintiffs were registered as proprietors of the estate they caused a letter to be written to the defendant requiring him to vacate the premises. The trial judge found this to be ineffective as the plaintiffs at that time were not the owners of the farm and had no power to give the notice to quit. However, on February 8, 1965, a further and valid notice to quit was given by the plaintiffs to the defendant requiring him to quit the premises at the end of February, 1965.

The defendant did not quit the premises and on March 30, 1965, the plaintiffs filed a plaint against the defendant claiming that the defendant was wrongfully and unlawfully occupying a building on their farm and praying for possession of the building and mesne profits. The defendant filed a defence in which it was alleged that he was lawfully in exclusive occupation of the building pursuant to a contractual licence binding on the plaintiff. It was averred that this contractual licence was granted in 1951 to the father by Mr. Pichot and that one of the terms of the licence was that the father would occupy the premises and in the event of the farm being sold or the licence being terminated after five years the father would be refunded his expenditure less 10%. It was also averred that the father had incurred expenditure in laying on water and electricity in the expectation of being allowed to stay on the terms set out in the contractual licence. It was also claimed that the plaintiff was estopped from terminating the defendant's occupation without compensation and from denying the defendant's licence to exclusive possession of the premises; and the defendant counter-claimed for reasonable compensation in the event of his licence being terminated.

The trial judge gave judgment awarding possession of the building to the plaintiffs on payment by the plaintiffs of Shs. 27,000/- compensation to the estate of the father and ordering that the plaintiffs pay the costs. The judge held that the plaintiff was liable to pay compensation by reason of the provisions of s. 40 of the Transfer of Property Act. The judgment was given on December 20, 1965, and at that time no letters of administration of the estate of the father had been taken out by the defendant. The judge dismissed the defendant's counter-claim with costs, holding that he was not entitled to bring it before taking out letters of administration. Following the delivery of the judgment further orders were made in relation to the payment of compensation and it appears that the present position is that the plaintiffs paid

this sum, which is

now deposited in court under an order of the High Court. We were informed from the Bar that the defendant gave possession of the building on a date that I shall take to be May 31, 1966, as this seems to be the date agreed by the parties.

The plaintiffs filed an appeal against that part of the judgment which required them to pay compensation and which failed to award them mesne profits. Subsequent to the appeal being filed, the defendant took out letters of administration of the estate of his father. He then applied to this court asking that as administrator he should be joined as a party to these proceedings but this application was rejected by the court.

A considerable number of points were argued on the appeal. These included whether the plaintiffs, by reason of the transfer of the farm being under the Registration of Titles Act, took the farm free of any encumbrance to pay any compensation; whether the claim for compensation was time-barred; whether compensation could properly be ordered to be paid to a person who was not a party to the proceedings and who was not in existence at the time of the judgment; whether the contractual licence given to the father was terminated by each of the sales of the farm and if compensation was payable who was liable therefor; whether the amount of compensation for the building was correctly assessed; and whether the order for costs was correct. All of these points, however, only arise for consideration if the defendant as successor to his father (and for this purpose I shall assume that the defendant is a lawful successor to his father and that no difficulty arises by reason of the fact that the defendant was not, at the time of the proceedings, the administrator of his father's estate) is entitled to compensation under the terms of the contractual licence either, first, by reason of s. 40 of the Transfer of Property Act, or, secondly, by reason of the estoppel which he pleaded. If he is not, then the question of mesne profits arises; if he is, then the points I have referred to above arise.

Before I consider these two basic issues it would be convenient to deal with the claim for compensation in respect of the expenditure for laying on light and water. I am unable to see any basis on which these amounts could be recovered by the defendant. These amounts appear to be claimed in the defence on the basis that the expenditure was incurred "in the expectation of being allowed to stay" on the terms of the contractual licence given to the father in 1950. The judge made no finding that anyone had agreed to reimburse the father these amounts, nor does he set out any reason for holding that the defendant was entitled to recover these amounts. I am satisfied from the evidence that the father was told at the time that he incurred such expenditure that it was to be on his own account. There was thus no contractual obligation to reimburse the expenditure, with the result that s. 40 does not apply. Nor does expenditure of money by a person on another's land of itself give rise to any equity. The oft-quoted dictum of Lord Kingsdown in *Ramsden v. Dyson* (1), ((1866), L.R. 1 H.L. at p. 170), which is the foundation for the doctrine that in certain circumstances the expenditure of money on another's land gives rise to certain equities, is followed by a passage at p. 171 which is of equal importance. It is as follows:

"If, on the other hand, a tenant being in possession of land, and knowing the nature and extent of his interest, lays out money upon it in the hope or expectation of an extended term or an allowance for expenditure, then, if such hope or expectation has not been created or encouraged by the landlord, the tenant has no claim which any court of law or equity can enforce."

Whatever may be the position in relation to the expenditure on the building consequent upon the licence given to the father in 1950, the father would have had no claim to be reimbursed the cost of installing light and water, as this

was an expenditure he incurred for his own purpose and after being informed that the installation must be at his own cost. As the father would not have been entitled to be reimbursed the expenditure, clearly the defendant is not so entitled.

Turning now to the question whether the defendant can recover compensation under s. 40 of the Transfer of Property Act, it is necessary to consider carefully the relevant words of that section, which are as follows:

- “40. *Obligation annexed to ownership, but not amounting to interest or easement.* . . . where a third person is entitled to the benefit of an obligation arising out of contract and annexed to the ownership of immovable property but not amounting to an interest therein or easement thereon, such . . . obligation may be enforced against a transferee with notice thereof or a gratuitous transferee of the property affected thereby, but not against a transferee for consideration and without notice of the . . . obligation, nor against such property in his hands.”

It is to be noted that before an obligation may be enforced against the specified persons the following factors must exist; it must arise out of a contract; it must be annexed to the ownership of the land; and it must not amount to an interest in the land or an easement thereon.

The obligation to permit the father to occupy the building until the licence was terminated and the obligation to pay compensation clearly arose out of contract, so the first factor is satisfied. The obligation to permit the occupation of the building until termination of the licence is clearly annexed to ownership, as only the owner of the land could implement it. The position in relation to the payment of compensation is not as clear, but I consider it to be so inextricably linked with the occupation of the building as to be annexed to the ownership of the land. Thus the second factor is also satisfied. It is on the third factor that in my view the defendant fails in so far as his claim is concerned. Taking the terms of the licence as found by the trial judge, I understand those terms to be that the licence to occupy the building is a personal one given to the father. It is inconceivable that either the licensor or the father imagined for one moment that the father's descendants, who might be entirely unsuitable, would have any right to remain under the licence or that the father could assign his licence to occupy the building to a third person. It is the essence of a licence of this nature that it is personal to the licensee and creates no interest which can be disposed of by the licensee. As has been said well over 100 years ago, it creates nothing substantial which is assignable. I consider therefore that the third factor would have been satisfied if the claim had been made by the father because the obligation did not amount to an interest in land. The basis of the defendant's claim, however, must be that this obligation created an interest in land which devolved on him by operation of law. If it is not so, then the licence with its concomitant term for compensation is personal to the father and, being personal, any rights and obligations thereunder die with the father. If, however, it is an interest in land then it does not come within s. 40. It is to be noted that there are no facts pleaded in the defence to show how the defendant became entitled to the benefit of the contractual licence given to the father. Whatever may have been the rights of the father, with respect to the trial judge I am satisfied that he was in error in holding that the defendant had any right to compensation under s. 40 of the Transfer of Property Act.

The second basic issue is whether the plaintiffs, by reason of the licence given by the plaintiff's predecessor in title to the father, are estopped from recovering possession of the building from the defendant without payment of compensation. In order to decide this question it is necessary to consider the nature of an estoppel. An estoppel is a rule of evidence which may enable a cause of action to succeed but which can never of itself found a cause of action (see *Nurdin v.*

Lombank (2)). The right to plead an estoppel does not give any title to the thing which is the subject matter of the estoppel (see *Balwant v. Kipkoech* (3)). Before an equitable estoppel, which may consist of the representation of a legal relationship, can arise there must be a clear and unequivocal representation (see *Century Auto v. Hutchings Biemer Ltd.* (4)). *Inwards v. Baker* (5) is perhaps the clearest example of a case where the expenditure of money by a person on another's land in expectation, by reason of a representation made by the owner of the land, of being allowed to occupy that land, gives rise to an estoppel precluding the owner from giving any evidence of an act which would terminate that occupation except in accordance with the representation. This right to continue in occupation, however, creates no title in the land and the right is co-extensive with, and dependent upon, a clear and unequivocal representation. Under s. 120 of the Evidence Act, 1963, an estoppel based on representation operates not only between the parties to the representation but also, in proper cases, between their representatives. (See also *Hopgood v. Brown* (6).)

Bearing these elements of an estoppel in mind, I turn to consider whether on the facts of this case the defendant, who is the successor (as I have assumed) of the father, can, by reason of a licence granted to the father on the terms as found by the judge and which I have set out, resist the termination by the plaintiffs, who are the successors in title to the St. Benoist. Plantations Ltd., of the defendant's occupation of the building unless compensation is paid. The right of the father to plead an estoppel gave him no title in the building which he could pass on to the defendant or which passed to the defendant by operation of law. The defendant, therefore, must rest his right to plead an estoppel upon a clear and unequivocal representation which would give him the right to continue in occupation until compensation is paid. But the representation found by the judge is merely a licence to the father to occupy the building until termination of the licence and payment of compensation. Even if this means that the payment of compensation is a condition precedent to the termination of the licence there is nothing in the representation which suggests that this licence to the father is anything other than a personal licence to him.

In *Errington v. Errington* (7) Denning, L.J. said of persons who by permission were occupying a building in respect of which they had expended a sum of money ([1952] 1 All E.R. at p. 155):

"They were not tenants at will, but licensees. They had a mere personal privilege to remain there, with no right to assign or sub-let. They were, however, not bare licensees they were licensees with a contractual right to remain. As such they have no right at law to remain, but only in equity, and equitable rights now prevail."

This must be the position. Can it seriously be suggested that this licence given to the father to remain on another's land conferred some sort of right on the father which he could assign to another, or which he could dispose of to another by will, or which devolved upon another by the operation of law? If the father went bankrupt could the trustee in bankruptcy go into occupation and demand compensation or dispose of this licence as if it were an asset of the bankruptcy? These questions have only to be posed for them to be answered by an emphatic negative. All of this shows clearly the personal nature of the licence given to the father and this in turn shows that no clear and unequivocal representation was made which entitles the defendant to plead that the plaintiffs are estopped from terminating the defendant's occupation of the building, except on payment of compensation to him. I am satisfied, therefore, that the plaintiffs were not estopped from terminating the occupation of the defendant unless they paid compensation either to him or to any other person.

As the plaintiffs were entitled to terminate the occupation of the building by the defendant without payment of compensation, and as they did terminate such occupation from March 1, 1965, and as the defendant wrongfully continued to occupy the building until May 31, 1966, the plaintiffs are clearly entitled to mesne profits. The judge made no finding as to the rental value of the building. This value is given by the plaintiffs as Shs. 300/- a month and by the defendant as Shs. 80/- to Shs. 100/- a month. I very much doubt whether, at the time in question and in the conditions prevailing in the area, the building would then have been let at more than Shs. 100/- a month. Certainly the evidence led by the plaintiff does not satisfy me that any higher rental would be a proper basis upon which to award mesne profits. The defendant has been wrongfully in possession for fifteen months and the plaintiffs are thus entitled to Shs. 1,500/-.

For these reasons I would allow the appeal with costs, set aside the judgment and decree of the High Court in so far as it ordered the plaintiffs to pay or deposit Shs. 27,000/- compensation and to pay the costs of the claim, and substitute therefor a judgment and decree ordering that the defendant do pay to the plaintiffs Shs. 1,500/- as mesne profits and the taxed costs of the plaintiffs' claim. I would also make an order that the sum of Shs. 27,000/- deposited in court by Messrs. Shah and Shah under an order of Harris, J., be paid out to the plaintiffs. I would also give leave to the plaintiffs to apply to a single judge of this court for any further order which may be necessary for the proper working out of this order.

As the other members of the court agree it is so ordered.

Duffus Ag VP: I have read the judgment of Newbold, P., and I agree with his judgment if the learned trial judge's findings as to the continued existence of, and as to the terms of the licence are correct. With respect, however, on the pleadings and on the evidence before the court I am of the view that the trial judge was incorrect when he found that the subsequent purchasers of the property were bound by the licence and that there had not been an automatic termination of the licence on the first sale.

It is agreed that this was a contractual and a revocable licence. A revocable licence is terminated by the death of the licensor or of the licensee, or by an assignment of the land over which the licence is enjoyed (see *Coleman v. Foster* (8), *Wallis v. Harrison* (9) and *Woodfall's Landlord and Tenant* (26th Edn.), p. 12). This is a general statement of the law but the contract itself provided for the determination of the licence on a sale. I refer here to para. 4 of the defence setting out the terms of the licence and in particular to para. 4 (e) which impliedly provides that the licence should come to an end on the farm being sold and for Cheta Ram to be then refunded his expenditure less ten per cent. A sale in fact occurred and the property was transferred to Cheleta Ltd. on January 23, 1956. Under the terms of the contract the licence came to an end and Cheta Ram then had a claim for compensation against St. Benoist Plantation Ltd. or against Mr. Pichot, the managing director who granted the licence. There is evidence that the parties accepted this as the position and that Cheta Ram even went so far as to make a claim, apparently for compensation, against St. Benoist Plantation Ltd. In this respect I would refer to the notes of the meeting held on December 7, 1955 (Ex. 1) which set out the fact that Cheta Ram was informed that the farm had been sold and that he had no claim against the purchasers for compensation but that he could claim against Mr. Pichot or St. Benoist Plantation. Then followed the letter to Cheta Ram dated December 13, 1955, clearly setting out the position and then we are told by the respondent's witness Mr. Eric Mehlson that Cheta Ram had made a claim against the receiver of St. Benoist Plantation, and I think it must be assumed that this was a claim for compensation under his licence. It is my view therefore that it had been established that the original

licence between Cheta Ram and St. Benoist Plantation had come to an end, and there is no evidence to show that any new contractual licence had been entered into between Cheta Ram and any of the new and successive owners. In these circumstances the provisions of s. 40 of the Indian Transfer of Property Act would not, in my view, apply.

Cheta Ram was still allowed to remain in occupation of the shop premises but on the evidence his position would appear to have been no higher than that of a tenant at will or as a bare licensee.

I agree with the learned President that the appellant company were entitled to terminate the respondent's occupation of the buildings without payment of compensation and that it did terminate his occupation as from March 1, 1965. I also agree with his decision on mesne profits.

I agree therefore that this appeal be allowed with costs in accordance with the order as my Lord the President sets out.

Law JA: I agree with the judgment prepared by Newbold, P. and with the order proposed by him.

Appeal allowed.

For the appellant:

Shah & Shah, Nairobi

Ramnik R. Shah

For the respondent:

Hamilton Harrison & Mathews, Nairobi

H. N. Armstrong

Mohan Dairy v Ratilal Bhurabhai
[1966] 1 EA 571 (HCK)

Division: High Court of Kenya at Nairobi

Date of judgment: 4 November 1966

Case Number: 15/1966

Before: Farrell J

Sourced by: LawAfrica

[1] *Practice – Appeal from subordinate court – Exclusion of time requisite for preparation of decree – Civil Procedure Act (Cap. 5), s. 65 (2) (K).*

[2] *Practice – Revival of suit after death of defendant – Meaning of “continuing the suit” – Civil Procedure (Revised) Rules, 1948, O. 23, r. 8 (2) (K).*

[3] *Practice – Parties – Revival of suit against a dead defendant – Personal representatives not joined*

immediately.

[4] Limitation – Application to revive suit against dead defendant – Period of limitation – Whether art. 171 or 178 of Second Schedule to Indian Limitation Act, 1877 applicable – Indian Limitation Act, Schedule, art. 171 and 178 – Civil Procedure Ordinance, 1924, s. 106 (K).

Editor's Summary

On account of the death of the defendant the plaintiff's suit abated at the end of six months under O. 23, r. 4 (3). Subsequently the plaintiff applied under O. 23, r. 8 (2) to have the suit revived and to join the administrator of the deceased defendant as a party. The magistrate refused the application on the ground that the plaintiff had failed to show any sufficient cause preventing the continuance of the suit. On appeal to the High Court preliminary objections were raised by the administrator/respondent that the appeal was out of time and that it was incompetent being brought against a dead man. The appellant then argued that laches

could not operate before the limitation period within which to revive the suit had expired.

Held –

- (i) the period excluded from the time within which an appeal from a subordinate court should be filed under the Civil Procedure Act, s. 65 (2), runs from the date a copy of the decree is applied for till the date it is delivered;
- (ii) the plaintiff's appeal as of right from the magistrate's dismissal of its application to revive a suit can be brought nominally against the deceased defendant notwithstanding the absence of the deceased's personal representatives on the record;
- (iii) the relevant period of limitation within which to make an application to revive a suit under O. 23, r. 8 (2) was prescribed either by art. 171 or art. 178 of Schedule 2 to the Indian Limitation Act, 1877; since art. 171 referred to "an order of abatement" which was necessary under the Indian Civil Procedure Code, 1882 but not under O. 23, r. 4 and r. 8, the three year limitation period prescribed by art. 178 was the only one that was practicable within the meaning of the Civil Procedure Ordinance, 1924, s. 106, and should be applied in this case; *Mehta v. Shah*, [1965] E.A. 321 considered.
- (iv) the words "continuing the suit" in O. 23, r. 8 (2) do not include an application to revive a suit; further laches is immaterial where limitation applies.

Appeal allowed, cross-appeal dismissed, suit to revive and personal representative to be made a party.

Cases referred to in judgment:

- (1) *Mehta v. Shah*, [1965] E.A. 321 (C.A.).
- (2) *Sarat Chandra v. Maihar Stone and Lime Co.* (1922), 42 Cal. 62.

Judgment

Farrell J: This is an appeal from the decision of the resident magistrate, Nairobi, dismissing an application by the appellant (the original plaintiff) for an order that the suit, which had abated as a result of the death of the original defendant, should be revived and that the personal representative of the deceased defendant should be made a party. After the appeal had been filed, an order was made for the personal representative of the deceased defendant to be made a party to the appeal, and counsel has appeared on his behalf.

Two preliminary objections have been made at the hearing, the first that the appeal is out of time, and the second that the appeal is incompetent, being in form brought against a dead man.

The first point has now become of less importance since the court has discretion under the proviso to s. 65 (2) of the Civil Procedure Act to admit an appeal out of time, and counsel for the respondent, although the matter is not strictly before the court, has consented to dispense with a formal application to that end and has agreed not to oppose the application now informally made. Nevertheless, it is proper that I should give my decision on the legal submission. Under s. 65 (2) of the Act, an appeal must be brought within thirty days, but there is a proviso excluding from that period such time as the registrar shall certify as having been requisite for the preparation of and delivery of a copy of the decree. The decision

appealed from (which is headed “ruling” but should more correctly be intituled an order) was given on March 23, 1966, and apart from the proviso, the last date for filing an appeal was April 22. The appellant applied for a copy of the ruling on the next day, but did not apply for a copy of the decree until April 19. The decree was signed by the magistrate on April 27, but was not received by the appellant until May 9. The appeal was filed on May 18. A certificate was obtained from the registrar purporting to be issued under s. 65 (2) of the Act,

but, instead of confining itself to the preparation and delivery of a copy of the decree, it refers first of all to the appellant's application for a certified copy of the ruling on March 24, and goes on to certify that the period from March 24 to May 9 was required for preparation and delivery of "the said certified copies of the ruling and the formal order". It is clear on the face of the certificate that it does not comply with the terms of the section, and that the only proper certificate which could have been given was one which excluded from the period of thirty days the time running from April 19, when application was first made for a copy of the decree, to May 9 when it was delivered to the appellant. If a certificate in proper form had been presented to the court, the appellant would have had three more days after delivery of the copy within which to file his appeal. Even on that basis he was six days out of time. But as no proper certificate has been presented, the appeal was in fact filed twenty-six days out of time. That being so, the appellant must rely on the second proviso, and in view of the respondent's concessions already mentioned, it is unnecessary for me to consider whether good and sufficient cause has been shown for not preferring the appeal within the prescribed period.

The second preliminary objection that the appeal is in form brought against a dead man brings to light a curious position. By virtue of O. 23, r. 4 (3) of the Civil Procedure (Revised) Rules, 1948, a suit against a deceased defendant abates if no application has been made within the time limited by law for the legal representative of the deceased defendant to be made a party to the suit. It is common ground that the period of limitation for such an application is six months from the death of the deceased defendant, and that the suit abated on or about March 29, 1964. Under r. 8 (2) the plaintiff may apply for an order to revive a suit which has abated; and that is what the plaintiff has done in this case, at the same time joining an application (which in the circumstances would appear to be necessary) for the administrator to be made a party to the suit. The application for revival has been dismissed by the magistrate, and with it as a necessary consequence the application to make the administrator a party.

In the proceedings on the application the same counsel appeared for the administrator, and there is nothing on the record which indicates that he took the objection which he now takes, although the application itself was in name against the deceased defendant. If that is right he is not entitled to take the objection on appeal. But if I have misread the record, and the objection is properly taken, it is clear that an appeal lies as of right from the magistrate's order by virtue of O. 42, r. 1(1)(j); and it is difficult to see how the appellant can exercise his right of appeal otherwise than by bringing the proceedings nominally against the deceased defendant. It would be wrong to shut out a party from his undoubted right of appeal by reason of a defect in point of form which the appellant was powerless to remedy and in the circumstances I hold that the second objection fails.

I come now to the substance of the appeal. In the lower court counsel for the respondent had argued that the application for revival of the suit was time-barred on the ground that the period of limitation is sixty days; but the learned magistrate held that the period was three years and overruled this submission. He nevertheless dismissed the application on the ground that the plaintiff had failed to satisfy him that he was prevented by any sufficient cause from continuing the suit. He further held that the plaintiff had been guilty of undue delay and lack of diligence.

With regard to limitation the issue is whether art. 171 or art. 178 of the second schedule to the Indian Limitation Act, 1877, applies. Article 171 in terms applies to an application under s. 371 of the Code of Civil Procedure for an order to set aside an order of abatement, and lays down a period of sixty days from the date of the order of abatement. Article 178 is a residuary provision which lays down a

period of three years for applications for which no period of limitation is laid down elsewhere.

Under the Civil Procedure Code of 1882 the provisions for abatement on the death of a defendant were found in s. 368, corresponding to our O. 23, r. 4. The provisions for revival of a suit which has abated were found in s. 371, corresponding to our O. 23, r. 8. The latter section, however, referred to “the order” for abatement. This was appropriate where the abatement was due to the death of the plaintiff, in which case an order for abatement was necessary under s. 366, but inappropriate where the abatement was due to the death of a defendant, in which case under s. 368 (as under our O. 23, r. 4) abatement was automatic.

Counsel for the administrator relies strongly on the decision of the Court of Appeal for Eastern Africa in *Mehta v. Shah* (1) in support of his contention that the period of limitation for an application for an application under O. 23, r. 8 (2) is sixty days. That case was concerned with an application under O. 23, r. 3(1), and so is not directly in point; but nevertheless guidance may properly be looked for in the principle on which the decision is based. That principle is most clearly expressed in the judgment of Spry, J.A., in the following words ([1965] E.A. at p. 325):

“... where any rule of the Revised Rules corresponds with a section of the 1882 Code and it is practicable to read references to the latter in any enactment passed before the commencement of the Civil Procedure Ordinance as references to the former, it is obligatory to do so and it is immaterial whether or not the effect of the rule is similar to the effect of the section.”

The learned J.A. had previously held that the Indian Limitation Act, 1877, was such an “enactment”, and it is clear that O. 23, r. 8, of the Revised Rules “corresponds” with s. 371 of the 1882 Code, though worded differently. The question then is whether it is practicable to read the reference in art. 171 of the 1877 Act as a reference to O. 23, r. 8. In the case cited there was no difficulty in reading the reference in art. 175A to s. 365 of the Code as a reference to O. 23, r. 3(1), since the article defined the application merely by reference to the section and specified a period ascertainable by reference to the death of the plaintiff. But art. 171, in addition to mentioning the section, defines the application as one “for an order to set aside an order for abatement on dismissal”, and specifies the period by reference to “the date of the order for abatement or dismissal”. Under r. 4 (3) there is no order for abatement, but abatement is automatic. Can it then be said that it is practicable to read the reference to the section as a reference to the corresponding rule? In my view it is not; and I am fortified in this opinion by the passage in the judgment of Duffus, J.A. ([1965] E.A. at p. 335A) in which he expresses the view (admittedly obiter) that “this period of a sixty day limitation could hardly be applied to applications under O. 23, r. 8 as at present no order for abatement is made. It does appear, therefore, that the period of limitation for applications under r. 8 would at the present time be three years under art. 178 and not as before, sixty days under art. 171.”

In my opinion the decision in *Mehta v. Shah* (1) if properly understood is of no assistance to the administrator in the present proceedings and I agree with the learned magistrate in his finding that the period of limitation for the application under O. 23, r. 8, was three years, and that accordingly the application was not time-barred.

Having made that finding the learned magistrate continued as follows:

“I would however disallow the application since the plaintiff has failed to satisfy me that he was prevented by any sufficient cause from continuing the suit. He has been guilty of undue delay and a complete lack of diligence in making the present application, as indeed, he was in failing to take the

necessary steps in order to obtain the appointment of an administrator ad litem and cause him to be joined as a party to the suit at a much earlier date.”

In so ruling the learned magistrate was founding himself on the requirement in sub-r. (2), as a pre-condition for the granting of the application, that the applicant should prove that he was prevented by some sufficient cause from continuing the suit. The question is what is meant by the expression “continuing the suit”. The learned magistrate has assumed that it includes, at any rate, an application for revival under the sub-rule. That is not the view taken by some, at least, of the Indian courts on the corresponding Indian rule. In *Sarat Chandra v. Maihar Stone and Lime Co.* (2) ((1922), 49 Cal. 62 at p. 67) Sanderson, C.J., said:

“... the plaintiffs had then to show under O. 22, r. 9 [which corresponds to our O. 23, r. 8] that they were prevented by sufficient cause from continuing the suit. That means, in my judgment, that the plaintiffs had to satisfy the court that there was sufficient cause for not applying in time to bring the legal representatives of the deceased defendant on the record.”

Mulla on *The Code of Civil Procedure* (12th Edn.) at p. 969 states:

“Under sub-r. (2) (&c. of O. 22, r. 9) the applicant has to satisfy the court that he was prevented by some sufficient cause from making the application to bring the legal representative of the deceased upon the record within ninety days [the period laid down in the Limitation Act of 1908] from the date of the death of the deceased.”

The Calcutta case is cited as authority for this proposition.

In my view this is a correct construction of the sub-rule, and it is immaterial that in the Indian rule there is a third sub-rule applying s. 5 of the Indian Limitation Act (1908) to applications under sub-r. (2). Founding myself solely on the provisions of our O. 23, it seems to me that the words “continuing the suit” in r. 8 (2) relate back to the words “shall proceed with the suit” at the end of r. 3(1) and r. 4(1) as may be appropriate. It would, in my view, be an absurdity to apply a fixed period of limitation to applications under r. 8 (2) whether that period is sixty days or three years, and at the same time to impose on the applicant the burden of proving that he was prevented from making his application at an earlier time within the period. This would be contrary to the well-established rule of equity that laches has no application where limitation applies.

If that is right, the appellant has sufficiently discharged the onus upon him since the learned magistrate has found (at p. 2 of his judgment) – and there is no challenge to this finding – that it would have been impossible for the plaintiff to have applied to the court before December 8, 1964, for Soni to be made a party as the deceased’s legal representative. Nor in my view is it relevant to suggest that he could have taken steps to appoint an administrator ad litem since r. 4(1) does not appear to me to contemplate the substitution of any other person than “the legal representative” of the deceased defendant.

For the above reasons the appeal is allowed and the cross-appeal is dismissed. The order of the lower court dismissing the application is set aside and it is ordered that the suit shall revive and that the legal representative of the deceased defendant Dhirajlal Ratilal Soni be made a party to the suit.

Before ruling on costs I wish to hear further argument.

Appeal allowed, cross-appeal dismissed, suit to revive and personal representative to be made a party.

For the appellant:

E. P. Nowrojee and J. H. Sampat, Nairobi

For the respondent:

Satish Gautama, Nairobi

Rudewa Estates Limited v Commissioner of Stamp Duties
[1966] 1 EA 576 (CAD)

Division: Court of Appeal at Dar-es-Salaam

Date of judgment: 21 November 1966

Case Number: 42/1966

Before: Sir Charles Newbold P, Duffus Ag VP and Law JA

Sourced by: LawAfrica

Appeal from: The High Court of Tanzania – Mustafa, J.

[1] Stamp duty – Relief from duty – Transfer of property from an associated company to another – Transferor company beneficial owner of ninety per cent. of issued share capital of transferee company – Transferor company in voluntary liquidation but solvent – Whether exempt from ad valorem stamp duty – Stamp Duty Ordinance (Cap. 189), s. 38A (T.).

[2] Company – Winding-up – Member's voluntary winding-up – Liquidators appointed – Whether company beneficial owner of its assets – Liquidators position as trustee for the creditors and agent for the company.

Editor's Summary

By an agreement of sale made in October, 1964 R.E.L. Ltd. agreed to sell free from all encumbrances its right title and interest in seven pieces of land together known as Rudewa Estate to L.E.R. Ltd. The transferor company went into voluntary liquidation four days after the agreement and it was not in dispute that the transferor company was solvent. It was common ground that at all material times the transferor company owned the whole of the issued share capital of the transferee company. In July, 1965, seven instruments of transfer, assignment and conveyance, necessary to put into effect the agreement for sale, were submitted to the respondent, with a claim that they were exempted from stamp duty under s. 38A of the Stamp Ordinance on the ground that their effect was to transfer the beneficial interest in property from one corporate body to another, and that one such corporate body was beneficial owner of not less than ninety per cent. of the issued share capital of the other. The respondent ruled that the instruments were not exempted from ad valorem stamp duty on the ground that the transferor company had ceased at the relevant time to be the beneficial owner of its assets. On a case stated, the High Court upheld the decision of the respondent holding that as the transferor company was in liquidation when the instruments of transfer were executed, it was not then the beneficial owner of its assets. On further appeal it was argued that a fully solvent company in voluntary liquidation can and does retain beneficial ownership of its assets until such assets are legally assigned to a third party by such company acting

through its liquidator.

Held –

- (i) in the case of a solvent company in voluntary liquidation, there is no hindrance or limitation on the company's beneficial ownership of its assets, unless there is reason to doubt that the creditors will be paid in full. *Oriental Inland Steam Navigation Co., Ex parte Scinde Railway Co. and Inland Revenue Comrs. v. Olive Mill Ltd.* not followed;
- (ii) when the transferee company presented the seven instruments of conveyance or transfer to the respondent, the transferor company, although in liquidation, was the beneficial owner of more than ninety per cent. of the issued share capital of the transferee company, and was the beneficial owner of the properties the subject of the conveyances and transfers;
- (iii) no stamp duty was chargeable and the instruments were entitled to the relief from duty under s. 38A of the Stamp Duty Ordinance.

Appeal allowed.

Cases referred to in judgment:

- (1) *Re Oriental Inland Steam Navigation Co., Ex parte Scinde Railway Co.* (1874), 9 Ch. App. 557.
- (2) *Inland Revenue Comrs. v. Olive Mill Ltd.*, [1963] 2 All E.R. 130.
- (3) *Gerard v. Worth of Paris Ltd.*, [1936] 2 All E.R. 905.
- (4) *Anglo-Baltic and Mediterranean Bank v. Barber and Co.*, [1924] 2 K.B. 410.
- (5) *English Sewing Cotton Co. v. Inland Revenue Comrs.*, [1947] 1 All E.R. 679.
- (6) *Re Farrow's Bank Ltd.*, [1921] 2 Ch. 164.

Judgment

Law JA: By an agreement of sale made on October 3, 1964, R.E.L. Ltd. (hereinafter referred to as the transferor) agreed to sell free from all encumbrances its right title and interest in seven pieces of land together known as Rudewa Estate to L.E.R. Ltd., a company which has since changed its name to Rudewa Estates Ltd. (hereinafter referred to as the transferee). By cl. 4 of the agreement it was provided as follows:

“This agreement is subject to the consent of the Commissioner for Lands Dar-es-Salaam to the whole transaction and immediately on the signing thereof the vendor and the purchaser shall submit the same for such consent. In the event of such consent being refused this agreement shall be void . . .”

Consent was given on November 23, 1964, by the Commissioner for Lands. On October 7, 1964, however, the transferor went into what is known as a members voluntary liquidation, pursuant to a special resolution passed at an extraordinary general meeting of the transferor held on that date and two liquidators were appointed. It is not in dispute that the transferor was solvent, and a statutory declaration of solvency was duly made. It is also not in dispute that at all material times the transferor owned the whole of issued capital of the transferee. On July 24, 1965, seven instruments of transfer, assignment, and conveyance, necessary to put into effect the agreement for sale of October 3, 1964, were executed and those instruments were submitted to the Commissioners of Stamp Duties by the transferee on August 2, 1965, with a claim that they were exempted from stamp duty under s. 38A of the Stamp Ordinance (Cap. 189). That section exempts from duty instruments of conveyance and transfer, where it is shown to the satisfaction of the Commissioners that the effect of such instruments is to transfer a beneficial interest in property from one corporate body to another, and that one such corporate body is beneficial owner of not less than ninety per cent. of the issued share capital of the other. The Commissioners decided that the instruments were not exempted from stamp duty, for the following reasons, which are taken from the case subsequently stated by them to the High Court:

“The Commissioners were of the opinion that the relief from ad valorem ‘conveyance’ and/or ‘transfer of lease’ duty which had been claimed does not apply in this case. The Commissioners were not satisfied as regards any of the instruments that at the relevant time R.E.L. Ltd. was beneficial owner of not less than ninety per cent. of the issued share capital of the appellant company. Having regard to the terms of the agreement and to the fact of the winding-up of R.E.L. Ltd. the Commissioners took the view that at the relevant time R.E.L. Ltd. had ceased to be the beneficial owner of the shares in the appellant company or any part thereof.”

Being dissatisfied with this decision, the transferee appealed to the High Court by way of case stated, the

questions for determination being:

- (a) whether the instruments presented for adjudication are liable to duty as ruled by the Commissioners;

(b) if not, with what duty (if any) the instruments are chargeable.

The learned judge upheld the decision of the Commissioners. He held that as the transferor was in liquidation when the instruments of transfer were executed on July 24, 1965, it was not then the beneficial owner of its assets, including the total issued share capital of the transferee, so that it was not on that date the beneficial owner of not less than ninety per cent. of the issued share capital of the transferee, and accordingly the transactions did not come within the scope of s. 38A of the Stamps Ordinance. He rejected a submission that the agreement of sale had the effect of transferring the equitable beneficial interest to the transferee on the execution of that agreement, because the consents required by law to make that agreement operative were not given until after the transferor went into liquidation, and he held that those consents did not relate back to the date of execution, so that the transferee did not acquire any beneficial interest in the properties before the transferor went into liquidation.

From this decision the transferee now appeals to this court. The principal ground of appeal is ground 2 in the memorandum which reads as follows:

“The learned judge failed to draw any or any proper distinction between voluntary and compulsory winding-up of companies, and should have held that a fully solvent company in voluntary liquidation can and does retain beneficial ownership of its assets until such assets are legally assigned to a third party by such a company acting through its liquidator.”

The learned judge, following the decisions in *Re Oriental Steam Navigation Co., Ex parte Scinde Railway Co.* (1) and *Inland Revenue Comrs. v. Olive Mill Ltd.* (2), held as follows:

“... it seems to me the decision of the Oriental Inland Steam Co. case (1) was in the main right, and is consistent with the view that on liquidation there is a sort of charge on the assets in favour of the creditors which can be regarded as depriving the company of the beneficial ownership. I believe that a liquidator even in a voluntary winding-up is not purely and solely an agent of the company and merely stands in the shoes of the previous directors, but that his duties are more involved, and his is a composite role. He is part agent and part trustee and represents the interests of the company, the creditors and contributors, and perhaps it is because of his varied duties that there has not been any exact legal definition given to his status so far. I believe that each case has to be looked at on its own facts. I think on a liquidation the rights of other parties, for instance creditors and contributors, crystallise as it were, and some sort of charge arises over the assets of a company in their favour which could be regarded as depriving a company of beneficial ownership of its assets, but such interest would be encumbered and rather indeterminate. It may well be that the company has still some sort of interest in its assets, but such interest would be encumbered and rather indeterminate.”

If I may say so, with respect, these observations on the status of a liquidator are sound and admirably stated in every respect. A liquidator is primarily the agent of the company; at the same time he has statutory duties towards the creditors and contributories which may involve him in responsibilities akin to those of a trustee. As the learned judge says, each case has to be looked at on its own facts. In the case of an insolvent company, the assets are impressed with a trust for the creditors; but the position is surely very different in the case of a solvent company in voluntary liquidation, when the rights of the creditors are not in jeopardy.

I turn to a consideration of the authorities relied on by the learned judge. *Re Oriental Inland Steam Navigation Co.* (1) was a case in which the court granted

an injunction restraining the levying of execution on the property of an insolvent company in compulsory winding-up. James, L.J., held that in such a case the property had “ceased to be beneficially the property of the company”, and Mellish, L.J. said, in the course of his judgment, that:

“ . . . in a winding-up the legal estate still remains in the company. But, in my opinion, the beneficial interest is clearly taken out of the company.”

That decision is no doubt good law in relation to the position of an insolvent company which is being compulsorily wound up. It was, however, followed in the *Olive Mill* case (2), which concerned a company being voluntarily wound up. In that case Buckley, J., after referring to the dicta of James, L.J., and Mellish, L.J. to which I have referred above, said:

“It has not been suggested to me that there has been any subsequent decision indicating to me that the views of the Lords Justices are not still good law, and it therefore appears to me to be established by the authority of that case that on the winding-up resolution being passed the beneficial interest in the Spinners’ shares held by the holding company ceased to reside in the holding company.”

It is with considerable diffidence that I venture to disagree with any decision of so eminent a company lawyer as Buckley, J., but with all due respect I have considerable doubts as to whether that part of the decision in the *Olive Mill* case (2) represented by the extract from the judgment quoted above is good law. For one thing, the judgment in *Re Oriental Inland Steam Navigation Co.* (1) related to an insolvent company in compulsory liquidation, whereas the *Olive Mill* case (2) and the case the subject of this appeal relate to solvent companies in voluntary liquidation, whose assets are sufficient to satisfy the rights of all who may have claims against these assets. I cannot, in these circumstances, see how the beneficial interest of a company in its assets is in any way affected. Again, Buckley, J. does not seem to have been referred to the case of *Gerard v. Worth of Paris Ltd.* (3), a decision of the Court of Appeal constituted by Slesser L.J., and Romer, L.J. That case concerned, as does this appeal, a company which went into liquidation under a resolution for a members’ voluntary winding-up. An employee was summarily dismissed by the liquidator and sued the company for wrongful dismissal and obtained damages. She applied for a garnishee order on a bank account in the name of the liquidator. The master refused to make the garnishee order absolute, but the judge in chambers reversed his decision. The Court of Appeal upheld the judge’s decision, holding that this being a members’ voluntary winding-up, it must be taken that the company was solvent, as there was no evidence to the contrary. There was therefore no question of all the creditors being paid in full and the court might properly refuse its discretion to stay an execution. In the course of his judgment, Slesser, L.J., referred to the following extract from the judgment of Scrutton, L.J., in *Anglo-Baltic and Mediterranean Bank v. Barber and Co.* (4):

“It is now the almost invariable practice when a company is in voluntary liquidation to stay proceedings in an action against it, because the result of allowing a judgment creditor to proceed to execution might be that, instead of the assets being divided among the creditors *pari passu*, the judgment creditor, by enforcing his judgment, would obtain an advantage over the other creditors.”

Slesser, L.J. went on to say:

“In my view this case is not one of those which might produce the mischief which Scrutton, J. intimates might arise, because this is not a case, the

company being solvent – and there is no suggestion of other creditors claiming these moneys – where the execution if allowed would necessarily interfere with the distribution of the assets *pari passu*.”

The effect of the judgment in *Gerard's* case (3) seems to me to be that in the case of a solvent company in voluntary liquidation, there is no hindrance or limitation on the company's beneficial ownership of its assets, unless there is reason to doubt that the creditors will be paid in full. In that case, the assets would be impressed with a trust which would restrict the company's beneficial interest. But so long as there is no reason to doubt the company's solvency, or that all its debts will be paid in full, I cannot see how the mere fact of going into voluntary liquidation can in any way limit or restrict the company's rights as beneficial owner of its assets, at any rate up to the stage when the liquidator holds those assets for transfer to any particular person by sale or otherwise.

In the case now under consideration there is no suggestion that the transferor was other than solvent and able to pay its debts in full. That being so, in my view no question arises of its assets being impressed with a trust, and it had at all material times a full beneficial interest in its assets, including the whole issued share capital of the transferee. It is therefore my opinion that, when the transferee presented the seven instruments of conveyance or transfer to the Commissioners of Stamp Duties, the transferor, although in liquidation, was the beneficial owner of more than ninety per cent. of the issued share capital of the transferee, and was the beneficial owner of the properties the subject of the conveyances and transfers, and accordingly no stamp duty is payable on those instruments. In my opinion ground 2 of appeal succeeds, and the other grounds need not be considered. I would allow this appeal, set aside the judgment and order of the court below, and substitute an order that all the instruments, the subject of this appeal, are not chargeable to duty on an *ad valorem* basis as ruled by the Commissioners of Stamp Duties, but are entitled to relief from such duty in terms of s. 38A of the Stamp Ordinance. I would set aside the order for costs made in favour of the respondents, and substitute an order that the costs of the proceedings in the High Court be paid by the respondents. I would award the appellant the costs of this appeal.

Sir Charles Newbold P: Two questions arise on this appeal. The first is whether a company which is in a members' voluntary liquidation and which is the owner of the only two issued shares in another company is “the beneficial owner” of those shares within the meaning of s. 38A of the Stamp Ordinance (Cap. 189). If it is then the second question does not arise.

The facts are set out in the judgment of Law, J.A., and I agree with his conclusion that the company is the beneficial owner of the shares within the meaning of that section. Even if, as the trial judge stated, some sort of charge arises over the assets of a company which is in a members' voluntary liquidation, that does not necessarily mean that the company ceases to be the beneficial owner of its assets. In the case of *English Sewing Cotton Co. v. Inland Revenue Comrs.* (5) Lord Green, M.R. said ([1947] 1 All E.R. at p. 679):

“I have never heard it suggested that where a mortgage transaction is made the result is to deprive the mortgagor of his beneficial interest.”

As Lord Sterndale, M.R. said in *Re Farrow's Bank Ltd.* (6), which was a case of a company in compulsory liquidation ([1921] 2 Ch. at p. 170):

“If this is not the property of the company beneficially, whose property is it beneficially?”

The evidence in this case showed that the liquidation of the company was at the relevant time at its very inception, and I am quite satisfied that the company

and no-one else was at that time the beneficial owner of the shares. I consider that any statements to the contrary in *Re Oriental Inland Steam Co.* (1) and *Inland Revenue Comrs. v. Olive Mill Ltd.* (2) are not, in so far as East Africa is concerned and in respect at least of a company in a members' voluntary liquidation, good law, and those cases should not, in this respect, be followed.

I agree with Law, J.A., that the appeal should be allowed and an order will be made in the terms proposed by him.

Duffus Ag VP: I also agree. This appeal depends on the meaning of the words "beneficial owner" as appearing in s. 38A (2)(b)(i) of the Stamp Ordinance (Cap. 189), and on the question whether a company in voluntary liquidation is still the "beneficial owner" of its assets.

The expression "beneficial owner" can be used in various contexts. Thus as used in a conveyance to which the Land (Law of Property and Conveyance) Ordinance (Cap. 114) applies, it means that the vendor impliedly gives the four covenants of a right to convey, quiet enjoyment, freedom from incumbrances, and for further assurance. The expression, however, as used in the Stamp Ordinance is not a term of art but must be given its ordinary and popular meaning. In my view this simply means that the company holds or owns the shares of the other corporate body for its own benefit, that is that the company itself owns the shares and does not hold these shares as the nominee or as a trustee for anyone else. The provisions of s. 224 of the Company's Ordinance (Cap. 212) apply and in the case of a voluntary winding-up the corporate state and corporate powers of the company continues until dissolution, and a liquidator exercises his powers during the winding-up on behalf of and in the name of the company. I agree therefore that in the circumstances of this case and for the reasons set out fully by Law, J.A., that the company, R.E.L. Ltd. were still the beneficial owners of all the shares issued in L.E.R. Ltd. and that therefore the appellant company is entitled to the benefit of the concession given in s. 38A of the Stamp Ordinance.

I agree with the order proposed by Law, J.A.

Appeal allowed.

For the appellant:

Donaldson & Wood, Dar-es-Salaam

M. Riegels

For the respondent:

The Attorney General, Tanzania

O. T. Hamlyn (Senior State Attorney, Tanzania)

Maganbhai Patel and others v Feroz Begum Qureshi and another
[1966] 1 EA 582 (HCK)

Division: High Court of Kenya at Nairobi

Date of judgment: 29 July 1966

Case Number: 8/1966

Before: Rudd and Harris JJ
Sourced by: LawAfrica

[1] Rent restriction – Standard rent – Assessment of standard rent by apportioned costs of construction between several floors – Re-opening previous orders – Notice of motion not supported by affidavit – Whether “good cause” shown within the meaning of s. 5(1)(m) of the Rent Restriction Act – Whether application properly before the court – Dismissal of application without going into merits of the case – Rent Restriction Act, s. 5(1)(m) and s. 8(2) (K.).

[2] Rent restriction – Standard rent – Re-assessment – Review of previous orders – Latest order having effect of varying standard rent – Whether order to operate retrospectively to when standard rent was first determined.

[3] Rent restriction – Application to re-open proceedings dismissed – Whether application frivolous and vexatious – Whether award for compensation justified – Rent Restriction Act, s. 32 (K.).

[4] Rent restriction – Costs – Magistrate has no power to award costs on Supreme Court scale.

Editor’s Summary

This was an appeal against the decision of the senior resident magistrate at Nairobi dismissing a notice of motion by the appellants which sought to have two rulings and orders issued thereon, re-opened and varied under the provisions of s. 5(1)(m) of the Rent Restriction Act. The premises in question comprised three floors, the ground floor of which consisted of shops or offices and the upper two floors contained residential flats. The appellants had sought by notice of motion, before the senior resident magistrate, to obtain a fresh apportionment of the relative percentages of the cost made as between the three floors of the building and a fresh assessment of the standard rent determined for the upper two floors. After dismissal of this motion the appellants appealed to the High Court but this appeal too was dismissed on technical grounds. Subsequently on January 25, 1966, the appellants applied to the same magistrate by a notice of motion to re-open and vary his decision but this application was again dismissed on the ground that no “good cause” has been shown within the meaning of s. 5(1)(m) of the Act and an order was made for compensation of Shs. 4,000/- under s. 32 of the Act and for costs on the Supreme Court scale. In the meantime the administrative officer attached to the magistrate’s court had prepared a new assessment of the standard rents appertaining to the flats purporting to accord with the terms of the magistrate’s ruling. The appellants concluded that the assessment amounted to a reinstatement of the original figures adopted by the Rent Control Board in 1952 and discarded by it in 1957, and not authorised by the magistrate’s recent ruling, and without waiting for the issue of the formal order embodying this ruling they applied for this assessment to be set aside. The magistrate also dismissed this application as premature and made an award of Shs. 15,000/- compensation under s. 32, *ibid.*, on the grounds that this application was frivolous and vexatious. The appellant thereupon appealed and objected *inter alia* to the award of costs on the Supreme Court scale and to the two orders for compensation. At the hearing of the appeal the court also considered the preliminary objection raised before the magistrate’s court by counsel for the respondents that before the court could embark upon a review of its previous orders the appellants must show “good cause” within the meaning of s. 5(1)(m).

for the re-opening of the proceedings, that “good cause” must be a question of fact, and that since the notice of motion was not supported by an affidavit no good cause had been shown and therefore the application was not properly before the court.

Held –

- (i) the principles upon which a review is granted under Civil Procedure Rules, O. 44, do not necessarily apply on an application to re-open proceedings under s. 5(1)(m) of the Rent Restriction Act;
- (ii) the magistrate misdirected himself in dismissing the motion of January 25, 1966, on the preliminary point without allowing the appellants to argue the case on the merits and to adduce evidence in support as they expressly sought to do; this was an error on a point of law or of mixed fact and law within the meaning of s. 8 (2) of the Rent Restriction Act;
- (iii) although the power conferred by s. 5(1)(m) is not in terms limited as to time, the Act contemplates a single standard rent for the whole of the period during which the particular premises are controlled; any order pronounced under this sub-section which has the effect of varying the standard rent must therefore in that respect operate retrospectively to the date with effect from which that rent was first determined;
- (iv) before an award for compensation under s. 32 is made the court must be satisfied on sufficient evidence that the party for whose benefit it will enure has in fact been put to some degree of trouble or expense by reason of the application, which was not the case here;
- (v) the magistrate had no power to direct that the costs awarded by him should be taxed and certified on the Supreme Court scale;
- (vi) the market costs of construction of the building were apportioned between the floors according to their superficial area.

Appeal allowed. Order accordingly.

The following judgments were read.

Judgment

Harris J: This is an appeal by the tenants of certain residential flats on plot No. L.R. 209/163/1/60 situate at Ngara Road, Nairobi, against the decision dated February 2, 1966, of the senior resident magistrate at Nairobi whereby he dismissed a motion by the appellants, dated January 25 this year, seeking to have two rulings of the learned magistrate dated May 14 and July 27, 1965, and the orders issued thereon, re-opened and varied under the provisions of s. 5(1)(m) of the Rent Restriction Act.

The premises in question comprise the two upper floors of a three-storeyed building which was erected in 1952 and the ground floor of which consists of shops or offices. Towards the end of that year the landlord, who was the predecessor in title of the present respondents, applied to the Central Rent Control Board to fix the standard rent of the premises. This application was made ex parte and on December 17, 1952 the board, having had the assistance of the assessment officer, allowed a figure of nine and a half per cent. of the aggregate of the market cost of construction and the market value of the land and assessed the standard rent at Shs. 4,512/- per month. On January 15, 1953, the apportionment of

this sum by the assessment officer was approved.

In 1957, by which time the present respondents had become the landlords of the premises, the tenants applied to the board to have this assessment of the standard rent reviewed, and on August 15 of that year the board, having heard the evidence of a Mr. Flatt, a valuer called on behalf of the tenants, together with

the submissions of counsel for both the tenants and the landlords, adhered to the percentage of nine and a half of the capital cost but accepted as correct Mr. Flatt's figure of £32,575 for the aggregate of the market cost of construction and the market value of the land in lieu of the figures previously accepted in 1952, varied the basis of apportionment of the capital cost as between the three floors by attributing fifty per cent. to the ground floor, twenty-seven per cent. to the first floor and twenty-three per cent. to the second floor in place of thirty-three and a third per cent. to each floor as previously fixed, and directed that the new assessment of rent should take effect from March 1, 1957. It is to be observed that the basis of apportionment suggested in evidence by Mr. Flatt was forty per cent. to the ground floor and thirty per cent. to each of the other two floors and not the figures accepted by the board.

On July 3, 1958, the present respondents, as landlords, applied to the board for a review of this new assessment on the ground that the apportionment of the cost of construction over the three floors was inequitable and did not truly reflect the actual cost incurred in respect of the first and second floors. The board dismissed the application in the erroneous belief that it had no power to entertain a second review of the original assessment but, following successive appeals by the landlords to the Supreme Court and to the Court of Appeal for Eastern Africa, the matter came before Mr. Gillespie, then the senior resident magistrate at Nairobi, to whose court the jurisdiction formerly exercised by the board had in the meantime been transferred. The learned magistrate on April 19, 1962, held that no sufficient cause had been shown for varying the decision of the board and dismissed the application but corrected with retrospective effect to 1957 a substantial mathematical error which had previously crept into the calculations of the board to the disadvantage of the landlords and directed that each party should bear their own costs of the application. From this decision both parties appealed to the Supreme Court, the landlords challenging the dismissal of their application for review and the tenants seeking to limit to a period of two years prior to the decision of the magistrate the retrospective operation of his order correcting the mathematical error in the board's figures. Both appeals came on for hearing before Miles, J., who, on August 11, 1964 dismissed the tenants' appeal and, on September 15 in the same year, allowed the landlords' appeal and remitted the case once more to the court of the resident magistrate to review the 1957 assessment of the board so far as it related to the apportionment of capital costs between the three floors of the building. The matter accordingly came before the senior resident magistrate at Nairobi on May 13, 1965, who, having heard counsel for the parties but without any evidence being adduced by either side, delivered on the following day his ruling which, together with the formal order thereon issued on September 24, 1965, constitutes the earlier of the two decisions which the present appellants, in their notice of motion of January 25, 1966 sought to have reviewed.

Shortly after the delivery of the ruling of May 14 and before the order thereon had issued the administrative officer attached to the magistrates' court prepared a new assessment of the standard rents of each flat purporting to accord with the terms of the ruling. From a perusal of this assessment the appellants concluded that it amounted to a reinstatement of the figures of the capital cost which had been adopted by the board in 1952 and discarded by it in 1957 and was not authorised by the ruling of May 14, and without waiting for the issue of the formal order embodying the ruling they applied to the learned magistrate on July 8, 1965, to have this new assessment set aside. The application was dismissed on July 27 and this constitutes the second of the two decisions which the appellants sought to have reviewed.

Prior to filing their notice of motion on January 25, 1966, the appellants lodged appeals to this court against the two decisions of May 14 and July 27, but these

appeals were dismissed on technical objections and were not heard or dealt with on the merits, with the result that, contrary to what he appears to have thought, they did not preclude the learned magistrate from dealing with the notice of motion on the merits, nor do they preclude this court from doing the same.

I now turn to the decision of the lower court against which this present appeal is taken. In the application leading to that decision the appellants sought to have the rulings and orders of May 14 and July 27, 1965, reviewed under the provisions of s. 5(1)(m) of the Act, a fresh apportionment of the relative percentages of the capital cost made as between the three floors of the building, a fresh assessment of the standard rent determined for the first and second floors, and an award of compensation in favour of the landlords under s. 32 of the Act set aside. In this notice of motion the appellants stated their intention to adduce *viva voce* evidence at the hearing in support of their application.

At the commencement of the hearing before the learned magistrate counsel for the respondents raised a preliminary objection to the effect that before the court could embark upon a review of its previous orders the appellants must show “good cause” within the meaning of s. 5(1)(m) for the re-opening of the proceedings, that “good cause” must be a question of fact, and that since the notice of motion was not supported by an affidavit no good cause had been shown and the application therefore was not properly before the court. Although this course had not been followed by the respondents themselves in relation to their application of July 3, 1958, the contention appears to have prevailed with the learned magistrate, who drew an analogy with the procedure envisaged both in O. 44 of the Civil Procedure (Revised) Rules, 1948, and in the Code of Civil Procedure in India relative to review, and he dismissed the motion on this preliminary objection without affording the appellants an opportunity to produce evidence or to deal with their application on its merits. It is desirable in the first place to consider the correctness of this course.

The relevant provisions of s. 5(1) of the Act are as follows:

- “(1) The court shall have power to do all things which it is required or empowered to do by or under the provisions of this Act, and in particular shall have power –
 - (a) to assess the standard rent of any premises either on the application of any person interested or of its own motion:
...
 - (m) at any time, of its own motion, or for good cause shown on an application by any landlord or tenant, to reopen any proceedings in which it has given any decision, determined any question, or made any order, and to revoke, vary or amend such decision, determination or order other than an order for the recovery of possession of premises or for the ejectment of a tenant therefrom which has been executed.”

There is nothing in s. 5(1) corresponding to those provisions of rr. 2, 3, 6 and 7 of O. 44 which make it clear that a person seeking thereunder to have a decree or order reviewed must first apply under r. 1 and then, if that application be successful, the court, in pursuance of r. 3 (2) will proceed with the review either at once or at a later date, and which require that, with certain exceptions, an application for review shall be made only to the judge who passed the decree or made the order sought to be reviewed. I respectfully agree with the view expressed by Miles, J. in his judgment of September 15, 1964, to which I have referred, to the effect that the principles upon which a review is granted under the Civil Procedure Code do not necessarily apply in the case of proceedings under s. 5 (1)(m) of the Act. In my opinion the analogy sought to be drawn with the procedure in review under O. 44 is misleading and it is not

necessary for an applicant seeking relief under s. 5 (1)(m) to proceed, as a first step, to ask the magistrate to reopen the proceedings and then, if that application be granted, to ask him to reconsider his original decision. It is an inherent feature of the Act, as is the case also with rent restriction legislation in other countries, that proceedings thereunder should be as simple, speedy and inexpensive as possible. Paragraph (m) of s. 5 (1) is designed to enable each of the parties or the court itself to have a prior determination of any matter reconsidered at any stage, the principle of *res judicata* being completely excluded, and the only limitation upon the exercise of the jurisdiction, apart from those expressly set out in the section, is that the court shall not alter its prior decision without good cause. When such a proceeding is to be set in motion on the application of one of the parties the applicant is required to make but one single application to the magistrate, indicating the manner in which and the extent to which he seeks to have the prior decision, determination or order of the court revoked, varied or amended, and the magistrate, if satisfied that the applicant has shown good and sufficient cause, may then reopen the proceedings so far as necessary and proceed to grant such relief as appears to him to be appropriate. Although the Act is silent on the matter it is reasonable to suppose that before entertaining such an application the court would require that it be reduced to writing, and that due notice be given to the other side, but where the grounds of the application appear sufficiently from the record of the prior proceedings there is no technical necessity to adduce further evidence either by affidavit or otherwise nor is there any necessity for the applicant to satisfy the court as to his right to be heard before being allowed to state the variation in the prior decision which he seeks and adduce his evidence and arguments in support.

It is clear, therefore, that the learned magistrate misdirected himself in dismissing the motion of January 25, 1966, on the preliminary point without allowing the appellants to argue the case on the merits and to adduce evidence in support as they expressly sought to do. This was an error on a point of law or of mixed fact and law within the meaning of s. 8 (2) of the Act. At the opening of the appeal before this court counsel for the respondents submitted by way of a preliminary objection that only issues of fact were involved and that, therefore, by virtue of that section, the appeal did not lie, but it is manifest not only that the objection cannot be sustained but that the appeal does lie and must succeed.

The question now arises as to what order this court should make. The respondents strongly urged that, if the appeal were to succeed, the matter should be sent back to the magistrate's court for re-hearing. On the other hand it became evident during the argument in this court that the correctness of certain additional views expressed by the learned magistrate in support of his dismissal of the motion is open to serious doubt. Bearing in mind the delays and expenses which the parties have already had to face and being of the opinion that this court, having had the case at hearing before it for some four days, is itself in a position to dispose of the matter, I consider that it is in the interest of the parties that, as suggested by the appellants, we should exercise our powers under rr. 20 and 27 of O. 41 and deal with the substance of the motion of January 25, 1966, thereby disposing finally, it is to be hoped, of the respondents' application of July, 3 1958.

The first matter which the appellants raised in their notice of motion was that in the order of May 14 the learned magistrate had erred in reverting to the original apportionment of the capital cost at 33 1/3 per cent for each of the three floors without having had any admissible evidence before him at the hearing to justify departing from the later apportionment of 50 per cent., 27 per cent. and 23 per cent. fixed by the board in 1957. The reason given by the magistrate

for having adopted this course was his agreement with grounds (1) and (2)(c) of the landlord's application then before him, namely, that the apportionment of the cost of construction over the three floors was inequitable and did not truly reflect the actual cost incurred in respect of the first and second floors, and that the costs of erecting foundations for the entire building must be distributed equally over all floors.

This conclusion was reached on a perusal merely of the record of the earlier hearing, no evidence was given to support the proposition that for the purpose of rent restriction proceedings the cost of erecting foundations of a multi-storey building should be distributed equally over all floors, and no justification can be found for his conclusion that the cost of the foundations was a factor completely ignored by the board when reaching its decision. Furthermore the order would appear to have been framed upon a basis involving a re-consideration of the costs of construction of the buildings which did not fall within the scope either of the respondents' original application or of the order of this court of October 1, 1964, remitting the case to the court of the resident magistrate. In short the proceedings appear to have constituted something in the nature of a rehearing of the entire application which had been before the board in 1957 but without the advantage, which was enjoyed by the board, of having the witnesses available for cross-examination and without any fresh evidence being introduced. The result was a reversal of the board's decision of 1957 and the restoration of the earlier assessment made in 1953 on an ex parte application by the landlord when the tenants were not represented and the evidence adduced by the landlord was not tested on cross-examination. It is difficult to see how this decision of the learned magistrate can be supported.

On the other hand the evidence given by Mr. Flatt to the board in 1957 was to the effect that in his opinion the capital costs should be apportioned between the three floors on the basis of 40 per cent. to the ground floor and 30 per cent. to each of the other floors and no evidence to the contrary was led. It is not clear how the board arrived at its figures of 50 per cent., 27 per cent. and 23 per cent. and in my opinion this court is justified in the circumstances of the present case in varying the determination of the board to accord with Mr. Flatt's evidence (which has not been contradicted by any later evidence) and in fixing this apportionment at the percentage figures of 40, 30 and 30 respectively.

During the hearing before us there came to light what appears to have been an error in the calculations leading to the order of the board in 1957 and which, so far as can be seen from the records of the various hearings of this matter, has not yet been corrected. In his evidence Mr. Flatt said that he would agree with the valuation of the land as at the prescribed date in 1939, placed upon it by the Nairobi City Valuer, at £3,300. but in its decision the board, in arriving at the capital cost of the entire building both as to the land and the construction, took the figures of £30,375 for the cost of construction and only £2,200 for the land, therefore arriving at the aggregate figure of £32,575 instead of £33,675. Although the respondents in whose interest it would have been to rectify this mistake, have not sought either in this court or elsewhere to have it put right, it would appear to be proper for this correction to be now made. In his evidence Mr. Flatt appears to have placed an even market value of Shs. 22,000/- upon the land in respect of each floor, which figure was accepted by the board, and I see no reason for departing from it. The aggregate figure upon which the total basic standard rent of the first and second floors for the purpose of s. 4 of the Act falls to be assessed will therefore be 60 per cent. of Shs. 607,500/- that is Shs. 364,500/- plus Shs. 44,000/- making in all Shs. 408,500/-.

A second matter raised by the appellants in their notice of motion was that the order of May 14, 1965, directed that the new assessment should take effect

as from January 15, 1953, that is, the date of the original apportionment by the board of the capital cost as between the several floors of the building, instead of, as they contended, some later date. Although the power conferred by s. 5(1)(m) is not in terms limited as to time, the Act appears to me to contemplate a single basic standard rent for the whole of the period during which the particular premises are controlled and therefore not to allow of two or more different standard rents in respect of two or more successive periods within the period of control. If this view be correct then it would seem to follow that any order pronounced under s. 5(1)(m) which has the effect of varying the standard rent must in that respect operate retrospectively to the time with effect from which that rent was first determined. No doubt the practical difficulties likely to arise from the financial adjustments necessitated by such an order will, in the majority of cases, be ameliorated by the law of limitation but, even apart from this factor, such difficulties cannot lead to the standard rent, when once fixed, being accorded a quality of mutability not envisaged by the Act. In my opinion the learned magistrate was right in directing that the revised standard rent, whatever may be its correct amount, should be made retrospective to the date with effect from which it was first determined and which appears to have been accepted by the parties as being January 15, 1953.

A third matter raised by the appellants related to their application of July 8 to set aside the assessment of the standard rent by the administrative officer made in purported pursuance of the ruling of May 14, 1965. Although neither the landlords' application of 1958 nor the decision of Miles, J. of September 15, 1964, nor indeed the ruling of May 14, 1965, itself, suggested a reopening of the figures as to capital cost which had been accepted by the board in 1957, the new assessment prepared by the administrative officer for inclusion in the formal order of May 14 when drawn was apparently based upon the earlier figures accepted by the board in 1952 instead of those accepted in 1957. It is clear, however, that until the formal order had been issued which occurred on September 24, 1965, this new assessment formed merely portion of that order in draft, and even if it went beyond the terms of the ruling of May 14 the action of the appellants in applying on July 8 to have it set aside would seem to have been premature. The learned magistrate did not share this view, however, but regarded the application as an attempt to obtain a review of his ruling of May 14 and therefore incompetent under the second proviso to s. 5(1)(m) by reason of an appeal to this court from the ruling which was then pending and has since been dismissed. In this he was, in my opinion, mistaken, for the application in no way sought a variation of the terms of that ruling, and although he was justified in dismissing the application it is necessary to consider the correctness, which the appellants have challenged, of the observations in his ruling of July 27 as to the proceedings being vexatious and of his direction given under s. 32 of the Act, that, in addition to paying the costs of the application, they should pay to the landlords a sum of Shs. 4,000/- in respect of the trouble and expense to which the latter had been put.

Section 32 of the Act enables the court, on the dismissal of any application which in its opinion was frivolous or vexatious, to order the applicant to pay to any other party a reasonable sum as compensation for the trouble and expense to which such party may have been put by reason of such application. This section is, in a sense, a corollary to para. (k) of s. 5 (1), which confers upon the court the power to direct that any party to an application shall pay the whole or any part of the costs. The provisions of para. (m) would be manifestly open to abuse at the instance of an applicant who persisted in repeatedly invoking his right to apply thereunder without reasonable justification or likelihood of success, and the jurisdiction both to award costs against such an applicant and to require him to pay compensation to any other party to the application

constitutes a useful means of restraint. It is important to observe, however, that s. 32 is to be invoked only in the case of an application or other proceeding which, in the opinion of the court, was either frivolous or vexatious, and that the payment to be directed is by way of compensation and not by way of a penalty or of punitive damages. From this it follows that the compensation must be related to and commensurate with such actual trouble and expense as may have been caused to the other party, and that, to avoid any question of double payment, it must not include such legal expenses as would be recoverable under an award of costs.

In his ruling of July 27 the learned magistrate, although correctly dismissing the appellants' application, founded himself, as I have stated, upon the erroneous belief that the application was prohibited by the second proviso to para. (m) and for that reason concluded that it was intended to harrass the respondents, was an abuse of the process of the court, and was vexatious. In my opinion the application, although premature, was not misconceived in the manner which the learned magistrate indicated and could not be fairly described either as intended to harrass the respondents or as vexatious with the result that no case for compensation had arisen. It is relevant to observe that in the course of this long-drawn out litigation, so far as can be gathered from the records before us, every appearance of the parties either before the Central Rent Control Board or in the magistrate's court, with the sole exception of the application in 1957, was at the instance of the present respondents and not of the appellants.

Furthermore, even if we were to assume that the learned magistrate was correct in his view that the application of July 8 was vexatious there would still arise the question as to whether he was justified in awarding compensation. In my opinion before such an award is made the court must be satisfied on such evidence as it thinks sufficient that the party for whose benefit it will enure has in fact been put to some degree of trouble or expense by reason of the application, and must have before it some evidence of the extent of such trouble or expense by reference to which the amount of the award may be determined. Here the record is completely silent as to all this. The terms of the application make it clear that the only issue being raised was as to whether the administrative officer, in arriving at his figures, had gone outside the purview of the ruling of May 14. No fresh evidence was involved and the entire proceedings consisted merely of the making of brief submissions by the respective advocates. There is nothing to show that any of the parties was present or need have been present and no particulars of any trouble or expense occasioned to the respondents were given. Where then is the foundation for the award of compensation or for its assessment at the sum of Shs. 4,000/-?

The last matter raised in the notice of motion to which reference need be made is the question of the award in favour of the respondents of the costs on the Supreme Court scale made by the learned magistrate in his decision of May 14, 1965. In his order of October 1, 1964, consequent upon his judgment of September 15, Miles, J. directed "the costs to date below to abide the result of the re-hearing", that is, the re-hearing on May 13 and 14, 1965, of the respondents' application of July 3, 1958. Having regard to the decision at which in my view the learned magistrate should have arrived it is reasonable that, as he directed, the respondents should have the costs of the application but the question arises as to whether he was correct in directing that they be taxed and certified on the Supreme Court scale. The application was brought under the provisions of the Increase of Rent (Restriction) Ordinance, 1949, which was repealed by the Rent Restriction Ordinance, 1959, and s. 37 (c) of the latter Ordinance declared that every application under the 1949 Ordinance which was pending immediately before the commencement of the 1959 Ordinance should, on such commencement, be deemed to be an application under the latter

Ordinance and be dealt with in accordance with its provisions. Unlike its predecessor the 1959 Ordinance did not empower the magistrate, in exercising his jurisdiction under s. 5(1)(m), to direct that costs awarded by him be taxed upon the Supreme Court scale, and although para. (c) of s. 37 does not appear in the present Act, constituting chapter 296 of the Laws of Kenya prepared in compliance with the Laws of Kenya (Revision) Act, that omission does not have the effect of reviving the provisions of the 1949 Ordinance. It is clear therefore that the learned magistrate had no power to direct that the costs awarded by him should be taxed and certified on the Supreme Court scale. I agree that the respondents should have their costs of the application of July 3, 1958, but only upon the scale appropriate to proceedings under the Act in the magistrate's court.

One other matter remains to be considered. In the order appealed from the learned magistrate, in dismissing the motion before him, again resorted to the provisions of s. 32 of the Act and awarded the respondents a sum of Shs. 15,000/- by way of compensation on the ground that the application was both frivolous and vexatious. Compensation can be awarded only in respect of an application which is dismissed and since, in my view, the motion should to a large extent have succeeded this award cannot be justified, even if it were not open to the objections which I have already indicated in relation to the award of Shs. 4,000/- contained in the order of July 27, 1965.

The order which it appears to me this court should make is as follows:

- (1) That this appeal be allowed and the ruling and order of the court below dated February 2, 1966, be set aside, the appellants to have the costs of the motion filed in that court on January 25, 1966, when taxed or agreed;
- (2) That the ruling and order of May 14, 1965, of the court below be set aside;
- (3) that the application of the respondents dated July 3, 1958, seeking a variation of the assessment of the standard rent of the premises fixed by the determination of the Central Rent Control Board dated August 15, 1957, be allowed to the extent only that the capital costs upon which the said assessment is to be determined shall for the purpose of such assessment be apportioned as between the three floors of the building in which the premises are situate on the basis of 40 per cent. to the ground floor and 30 per cent. to each of the two remaining floors in lieu of the basis upon which such determination was made by the said board, and that for the purpose of such apportionment the said capital costs shall be re-calculated upon the basis that the market value of the land upon which the said three-storied building is erected shall be deemed to have been on September 3, 1939, the sum of £3,300 instead of £2,200 and that of the said sum of £3,300 a sum of £2,200 shall be attributable to the first and second floors;
- (4) that the basic standard rent of the first and second floors (exclusive of permitted increases), assessed in accordance with the terms of this order, shall have effect from January 15, 1953;
- (5) that the respondents do have the costs of the said application of July 3, 1958, including the several hearings in the magistrate's court, upon the scale applicable to proceedings under the Act in that court;
- (6) that so much only of the ruling and order of July 27, 1965, as directs the appellants to pay to the respondents the sum of Shs. 4,000/- as compensation be set aside;
- (7) that the respondents do re-pay to the appellants so much (if any) of the sums of Shs. 4,000/- and Shs. 15,000/- referred to in the said orders of May 14, 1965, and July 27, 1965, and of the costs awarded by the said

orders of May 14, 1965 and February 2, 1966, as may have been paid to them by the appellants, together with interest thereon at 6 per cent. per annum as from the date or dates respectively upon which the same were so paid to the respondents until the date or dates of repayment;

- (8) that the appellants do have the costs of the appeal with a certificate for Queen's counsel and one junior counsel.

Rudd J: I have had the advantage of reading the judgment prepared by my brother Harris, J., and I agree with it. I have little to add except as regards the proper assessment of the total basic standard rent.

There is a complicated and involved historical background to this appeal.

In 1952 the respondent landlords' predecessor erected a three-story building consisting of a ground floor of shops or business premises and two upper floors consisting of a number of flats or dwellings. The ground floor was not controlled under the Rent Acts but the two upper floors were controlled. Before any of the flats were let an application was made to the Rent Control Board for the assessment of the total standard rents of the two upper floors which under the Act could not exceed 10 per cent of the cost of construction plus the value of the land at the prescribed date. It can now be said that the value of the plot on which the building was erected was on the prescribed date £3,300 or Shs. 66,000/-. These original proceedings were necessarily ex parte on the applications of the landlord or owner. The Board decided that the standard rent should be assessed on the basis of 9 1/2 per cent. per annum of the cost of construction plus the value of the land in relation to the two upper floors. On the basis of a report by its administrative officer it assessed the cost of construction of the two floors at Shs. 522,000/- based approximately on a calculation of 13,000 feet at Shs. 34/- a foot. Two thousand and forty-eight feet at Shs. 20/- a foot and Shs. 2,000/- for improvements and extras and Shs. 44,000/- or two-thirds of the total value of the land as the value of the land in relation to these two floors making a total for the two floors in question of Shs. 566,000/-. The Board on this basis assessed the total standard rent for the two floors at Shs. 4,512/- per month. This amounts to about Shs. 32/- a month more than 9 1/2 per cent. per annum on Shs. 566,000/-. The difference was apparently accounted for by additional servants' accommodation. After this assessment tenants appear to have been admitted on contractual rents which were lower than the standard rents.

After this the tenants were served with notices which had the effect of increasing their rents and in 1957 the tenants applied to have the assessment of the standard rents re-opened. On this application the only evidence adduced was that of Mr. Flatt, a professional land agent and valuer who testified that the total cost of the construction of the whole building should not have exceeded Shs. 607,500/- based approximately on an overall figure of Shs. 30/- a foot for the main construction of the building, Shs. 20/- a foot for terraces and Shs. 10/- a foot for balconies and he gave his measurements of these. He suggested at first that 60 per cent. should be apportioned to the cost of the ground floor which was better finished and 40 per cent. to the two upper floors, but after inspection he modified this to 40 per cent. for the ground floor and 30 per cent. for each of the upper floors. He accepted the value of the land as Shs. 66,000/-. He said the standard rent should not exceed 8 1/2 per cent. of the cost of construction. He said that Shs. 34/- a foot was not unreasonable but that he could not believe that the building cost as much as that and that Shs. 30/- a foot was a fair figure. There was no evidence in rebuttal of Flatt but it can be said that while his evidence as to costs and apportionment was supported by facts, his suggestion as to the 8 1/2 per cent. was not so well supported.

On this evidence the Board set aside its previous ex parte assessment and accepting Flatt's cost figures assessed the cost of construction of the building at Shs. 607,500/- and the value of the land at Shs. 44,000/- making Shs. 651,500/- in all and ordered that 50 per cent. should be apportioned to the ground floor, 27 per cent. to the second floor, 23 per cent. to the third floor and that the standard rents for the second and third floors should be calculated at 9 1/2 per cent. per annum on those figures.

The landlords then applied for a revision of the apportionments ordered by the Board which was refused on the ground that there was no power to revise a revision of the standard rent. The landlords appealed and carried the matter up to the Court of Appeal for Eastern Africa which held that there was power to re-open the matter and remitted the matter to the Supreme Court which ordered the resident magistrate's court which by that time had replaced the Board to re-open the matter and hear all complaints. The matter then came before Mr. Gillespie, resident magistrate, who held that there was no cause to interfere with the Board's decision as to the apportionment of the cost of the building or as to the 9 1/2 per cent. per annum rate of calculation. He revised the amount of the rents in order to correct a mathematical error of calculation and this had the effect of increasing the standard rents over the amounts calculated by the administrative officer and he made the recalculated rents retroactive to the date of the tenants' application to re-open the original standard rent which had been fixed ex parte soon after the construction of the building.

From these decisions both sides appealed, the tenants objecting to the 9 1/2 per cent. rate and the order for retroactive effect and the landlords objecting to the 50 per cent., 27 per cent. and 23 per cent. basis for apportionment.

The tenants' appeal was dismissed and the landlords' appeal was allowed on the ground that there was no evidence to support an apportionment on the basis of 50 per cent., 27 per cent. and 23 per cent. This apportionment was set aside and the question as to the proper basis for apportionment was referred back to the lower court.

The matter then came before Mr. Malik, senior resident magistrate. No further evidence was adduced. The main question argued appears to have been as to whether the cost of the several upper floors should be calculated on a differential percentage basis or on a straight one third per floor including the ground floor.

The learned senior resident magistrate was not prepared to accept Mr. Flatt's suggestion as to apportionment on a 40 per cent., 30 per cent. basis. He held that Flatt had not taken into account such matters as the cost of extra foundations and stronger works on the lower floors in order to sustain the upper floors.

In so far as the learned senior resident magistrate appears to have thought that Flatt took no account of such matters he was wrong in fact because Flatt's calculations were based on a flat rate per foot overall and this necessarily takes such matters into account to some extent.

The learned senior resident magistrate appears to have thought that because the rent had originally been assessed by the Board albeit ex parte there was no need to adduce evidence in support of that assessment. In this he was wrong in law. That previous assessment had been set aside by the Board. It was not reinstated until the senior resident magistrate himself purported to reinstate it in his order without any evidence to support it and without any witness being called at any time which the tenants could cross-examine as to the reason why it should not be adopted. It was the very thing in issue and once Flatt's evidence was taken and not broken down on cross-examination, the original assessment could not

be adopted without evidence. In fact as the earned senior resident

magistrate stated in his ruling or judgment the board's assessment officer accepted Flatt's evidence as to costs though he is stated not to have agreed with Flatt's suggested apportionment. In my opinion the question of the cost of the building was not remitted to the senior resident magistrate's court but only the apportionment. The senior resident magistrate held that the proper basis of apportionment of cost as between the several floors of the building should be a one-third basis per floor (and awarded the landlord costs on the high court scale). Although a close reading of the judgment might indicate a preparedness to support the original ex parte assessment of standard rent, it did not go so far as to decide in terms that that should be so. The tenants lodged an appeal against apportionment on a one-third basis. While this was pending the tenants discovered that the administrative officer was preparing or had prepared calculations for the individual flats to show a total monthly basic standard rent of Shs. 4,480/-. This was virtually the same as the old assessment of the basic standard rent assessed ex parte in 1952 omitting Shs. 32/- per month, the excess which was then included for servants' quarters. They applied to have such calculations set aside. This application was dismissed on the ground that an appeal was pending and compensation was ordered on the ground that the application was frivolous and vexatious. Then Mr. Malik signed an order fixing the individual standard rents as calculated by the administrative officer, that is virtually on the original ex parte assessment. The tenants appealed from that. Both these appeals were dismissed because of the non-submission of essential papers. They were never heard on the merits and it is proper to say that they were struck out rather than dismissed.

Instead of attempting to bring fresh appeals the tenants applied for a re-opening of the learned senior magistrate's decision as to the apportionment of the cost of construction on a one-third basis, the reversion to the original ex parte standard rents and the award for compensation. This application was dismissed on the ground that the matter was precluded by the result of the appeals. A further order for compensation was made against the tenants. The tenants now appeal from these orders. The appeal can only be entertained on questions of law or mixed law and fact.

The power of re-opening is very wide, in fact, the grounds are not restricted at all except that there must be good grounds for any alteration made on a re-opening. The application should indicate a prima facie case of good grounds for re-consideration but I do not think that it must always be supported by an affidavit. Where good grounds can be seen from a perusal of the record I do not think that an affidavit is necessary. The power to re-open indicates that the court is never necessarily functus.

In so far as the learned senior magistrate attempted to go behind Flatt's figures for the cost of construction which were accepted by the administrative officer and not opposed or contested, the lower court was in error not only in point of fact but in point of law also, for this was not a matter which was open upon the remit which was limited to the question of apportionment.

It is true that when the Board directed that the percentages should be calculated on a total cost of Shs. 651,500/- it fell into error which does not appear to have been noticed until it was indicated during the hearing of this appeal. This error did not affect the assessment of Shs. 607,500/- as the cost of construction which was never remitted for reconsideration. It was assessed by the Board on the evidence agreed to by its administrative officer and not contested by the landlord and it was in effect confirmed by the High Court which only remitted the matter of apportionment. There can be no real doubt either in fact or in law that the cost of construction was assessed at Shs. 607,500/- and there has been no evidence or justification for any alteration from this figure. But if the cost of construction of the upper floors is to be based on a percentage of the cost of

construction of the whole building plus the value of the land the basic figure must be taken as Shs. 607,500/- + Shs. 66,000/- not Shs. 607,500/- + Shs. 44,000/-. That is a percentage of Shs. 673,500/- not Shs. 651,500/- since Shs. 44,000/- is two-thirds of the value of the land.

In my view Flatt was possibly agreeing to Shs. 44,000/- or two-thirds of Shs. 66,000/- as the proportionate value of the land to be attributed to the two upper floors, but whether Flatt was agreeing to this or not is seems to me that the Board was valuing the land as regards to the two upper floors at Shs. 44,000/- when fixing the proportions in which the market cost of construction should be borne between the three floors at 50 per cent, 27 per cent. and 23 per cent. In my view we should adhere to this valuation of Shs. 44,000/- for the two floors and accordingly the proper basis for calculation is really a percentage of Shs. 607,500/- for each floor plus Shs. 22,000/- for each floor to be added to the percentage amount.

It can be argued that this is not a matter which was open for consideration by Mr. Malik's court on the remit by the High Court. Yet a correction is called for. There is an obvious miscalculation on the record. It is a slip which must be corrected. The same cannot be said for any variation from Shs. 607,500/- as the proper cost of construction of the whole building.

Now as to the percentage of the cost to be attributed to each floor. There is nothing to indicate why the percentage should be thirty-three and a third per cent. per floor except the fact that it was a three storey building. To say that in every two storey building the cost must be apportioned equally as between the floors is obviously wrong not only in fact but in law as a general proposition. It is wrong in law as a general proposition because it is completely unreasonable as a general proposition and takes no account of the relative finishes on the several floors or differences in superficial footage which may occur. I am not of course to be taken as saying that on a proper basis in particular cases the relative cost per floor might not work out as directly proportional to the number of floors though I think that would probably be unusual.

In the present case I can see no evidence to justify an apportionment in proportion to the number of floors. Flatt's figures were accepted by the Board and were not contested. He gave the footages as follows:

Ground floor 7,113 sq. ft.

1st floor 6,045 sq. ft., 1,088 sq. ft. terrace

165 sq. ft. balconies

2nd floor 6,045 sq. ft. and 765 sq. ft. balconies

and allowed Shs. 30/- a foot for the main construction, Shs. 20/- a foot for the terrace and Shs. 10/- a foot for the balconies.

On these figures, making allowance for the reduced cost of the terrace and balconies, the cost of the ground floor would be about 36 per cent. of the total cost and the cost of the two upper floors about 64 per cent. of the total cost but the evidence is that the ground floor was better finished. Consequently Flatt's assessment of 40 per cent. and 60 per cent. seems to me to be very reasonable and there was no other evidence which could be tested by cross-examination.

Therefore I think that Flatt's assessment of 40 per cent., 30 per cent. and 30 per cent. should be adopted.

In arriving at this I have proceeded in part on the basis of an enquiry into pure fact. I have done so because I do not think it necessary or desirable to remit the matter again to the lower court. There has

already been an unfortunate multiplicity of proceedings in different courts and it is high time that the matter be finalised.

In any case I think that the third proportion throughout cannot stand. There is no evidence to support it and it is contrary to all the evidence. Further in my view the learned Senior Resident Magistrate in reverting to it was activated by erroneous belief that he could revert to the original assessment without any evidence in support thereof, where there was evidence to the contrary which was not broken down in cross-examination.

As regards the orders for compensation I think they were wholly misconceived. There was no proof of damage. In my view the amounts ordered were very excessive and apart from that and more important, I do not consider that the applications for reopening and revision were made frivolously or vexatiously. We find that there were sound grounds in law and in fact for them in the result even though one of the applications may have been premature.

In the result the appeal will be allowed and there will be an order setting aside the orders for compensation and otherwise in accordance with the judgment of Harris, J.

The total basic standard rents per annum of the two upper floors are assessed on the following basis:

Cost of construction of these floors:

60 per cent. of Shs. 607,500/-, that is	Shs. 364,500/-
Value of the land in relation to these floors	44,000/-
	<hr/>
	Shs. 408,500/-

Basic standard rent $9 \frac{1}{2}$ per cent. of Shs. 408,500/- per annum, Shs. 38,807.50, say Shs. 38,808/- or Shs. 3,234/- per month.

There will be order accordingly. This amount of Shs. 38,808/- per annum or Shs. 3,234/- per month must be apportioned amongst the individual flats and will have retrospective effect as the total basic standard rent.

Appeal allowed. Order accordingly.

For the appellants:

J. K. Winayak & Co., Nairobi

Mackie-Robertson, Q.C. and J. K. Winayak

For the respondent:

Khanna & Co., Nairobi

D. N. Khanna and R. N. Khann